TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1920

No. [redacted]76

FRANK C. THORNTON AND THE CLEVELAND STAMPING AND TOOL COMPANY, PLAINTIFFS IN ERROR,

vs.

THOMAS J. DUFFY AND HERBERT L. ELIOT, MEMBERS OF AND COMPOSING THE INDUSTRIAL COMMISSION OF OHIO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED MARCH 17, 1919.

(27,006)

(27,006)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 920.

FRANK C. THORNTON AND THE CLEVELAND STAMPING AND TOOL COMPANY, PLAINTIFFS IN ERROR,

vs.

THOMAS J. DUFFY AND HERBERT L. ELIOT, MEMBERS OF AND COMPOSING THE INDUSTRIAL COMMISSION OF OHIO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 21, 1919.

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1 In the Supreme Court of Ohio.

No. 15,999.

FRANK C. THORNTON, Plaintiff in Error,

vs.

THOMAS J. DUFFY and HERBERT L. ELIOT, Members of and Composing The Industrial Commission of Ohio, and The Cleveland Stamping and Tool Company, Defendants in Error.

Certificate.

UNITED STATES OF AMERICA,
Supreme Court of Ohio, ss:

In obedience to the commands of the within writ, I hereby transmit to the Supreme Court of the United States, a true and duly certified copy of the complete record, all assignments of error and all proceedings in the within entitled case, together with a copy of all opinions filed therein.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Ohio, in the City of Columbus, State of Ohio, this 7th day of March, A. D. 1919.

[Seal of the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.

2 [Endorsed:] In the Supreme Court of Ohio. Frank C. Thornton, Plaintiff in Error, vs. Thomas J. Duffy and Herbert L. Eliot, members of and composing The Industrial Commission of Ohio and The Cleveland Stamping and Tool Company, Defendants in Error. No. 15,999. Certificate.

3 In the Supreme Court of Ohio.

No. 15999.

FRANK C. THORNTON, Plaintiff in Error,

vs.

THOMAS J. DUFFY and HERBERT L. ELIOT, Members of and Composing The Industrial Commission of Ohio, and The Cleveland Stamping and Tool Company, Defendants in Error.

Petition of Frank C. Thornton and The Cleveland Stamping and Tool Company for Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio.

To the Honorable Hugh L. Nichols, Chief Justice of the Supreme Court of the State of Ohio:

Frank C. Thornton, plaintiff in error, and The Cleveland Stamping and Tool Company, defendant and cross petitioner in error in

the above entitled cause, show by this petition to this Honorable Court, that in the records, proceedings and decisions in the Supreme Court of the State of Ohio, the same being the highest court of said state in which a decision could be had in this suit, a manifest error has occurred, greatly to the damage of said Frank C.Thornton and said The Cleveland Stamping and Tool Company.

That, as appears in the record and proceedings, there was drawn in question the validity of an act of the General Assembly
4 of the State of Ohio, passed February 16, 1917, and approved by the Governor, February 19, 1917, entitled, "An Act to amend section 1465-101 of the General Code of Ohio, making void contracts indemnifying employers against loss or liability for the payment of workmen's compensation, and agreements to pay such compensation, and making void contracts which indemnify the employer against damages when injury, disease or death arises from failure of employer to comply with lawful requirements for the protection of the lives, health and safety of employes, or when the same is occasioned by the wilful act of the employer or any of his officers or agents; prohibiting the issuance of licenses to enter into such contracts; and to repeal original section 1465-101 of the General Code of Ohio (107 O. L., pp. 6 & 7); and further, there was drawn in question the validity of section 1465-69 General Code of Ohio, as amended by an act passed by the General Assembly of the State of Ohio on March 20, 1917, and approved by the Governor March 29, 1917, entitled: "An Act to amend sections 871-5, 871-9, 1465-50, 1465-54, 1465-56, 1465-61, 1465-69, 1465-80, 1465-87, and 1465-90 of the General Code, to further define the powers, duties and jurisdiction of the state industrial commission, with reference to the collection, maintenance and disbursement of the state insurance fund for the benefit of injured and the dependents of killed employes, and requiring contribution thereto by employers," (107 O. L., pp. 157-164); and further, there was drawn in question an authority exercised under said State, to-wit: the authority of The Industrial Commission of Ohio to revoke its findings of facts under which said Frank C. Thornton and The Cleveland Stamping and Tool Company and the employers in the State of Ohio on whose behalf this action was brought, had and have the right to elect to pay the compensation and furnish the aid and services directly to
5 their respective employes and their dependents, as provided in section 1465-41*a* to 1465-103 General Code of Ohio, on the sole ground that said employers desire to insure the payment thereof or indemnify themselves against loss sustained by the direct payment thereof, or that they heretofore have so insured the payment thereof, or have so indemnified themselves, on the ground of said acts and said authority being repugnant to the Constitution of the United States;

Said Frank C. Thornton and said The Cleveland Stamping and Tool Company further say that in this cause, on the 31st day of December, 1918, final judgment was rendered against your petitioners by the Supreme Court of the State of Ohio, that being the highest court of law or equity in said State of Ohio, wherein it was adjudged that the Court of Appeals of Franklin county, Ohio, to which said

cause had been duly appealed from the Court of Common Pleas of Franklin County, Ohio, did not err at the trial of said cause in sustaining the validity of said acts and parts of acts hereinabove referred to and the authority thereunder exercised by the State of Ohio; and said Supreme Court of the State of Ohio therein affirmed the judgment of said Court of Appeals; and in said cause further adjudged that said acts of the General Assembly of the State of Ohio were valid laws, and the authority exercised thereunder was a valid exercise of authority; and that said laws and the authority thereunder exercised by said State, were not repugnant to Article XIV, Section 1 of the Constitution of the United States, which declares: "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws;" and were not repugnant to Article I, Section 10 of said Constitution, which declares, "No State shall pass any law impairing the obligation of contracts."

6 Your petitioners further show that they, and each of them, and each of the six hundred and seventy-five or more of the employers in the State of Ohio in whose behalf said action was brought, had contracts duly existing on and before the date on which said acts were passed, which, by the decision and judgment of said Supreme Court of the State of Ohio, are thereby rendered void.

All of which, to the prejudice of said Frank C. Thornton and The Cleveland Stamping and Tool Company, and the employers in the State of Ohio in whose behalf said action was brought, fully appears in the records and proceedings of the case and is specifically set forth in the assignment of errors filed herewith.

Wherefore, your petitioners pray for an allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Ohio and the Judges thereof, to the end that the record in this case may be removed into the Supreme Court of the United States, and the errors complained of by your petitioners may be examined and corrected and said judgment reversed, and said cause remanded, as provided by law; and that your petitioners may have such other and further relief in the premises as may be just; and your petitioners will ever pray.

FRANK C. THORNTON AND
THE CLEVELAND STAMPING AND
TOOL COMPANY,
By JUDSON HARMON AND
VORYS, SATER, SEYMOUR & PEASE,
Their Attorneys.

The writ of error as prayed in the foregoing petition is hereby allowed this fifth day of March, 1919, and the writ of error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of $1,000.00. Dated at the City of Columbus, Ohio, this 5th day of March, 1919.

HUGH L. NICHOLS,
Chief Justice, Supreme Court of State of Ohio.

7 [Endorsed.] No. 15,969. In the Supreme Court of Ohio. Frank C. Thornton, Plaintiff in Error, vs. Thomas J. Duffy and Herbert L. Eliot, Members of and Composing The Industrial Commission of Ohio, and The Cleveland Stamping and Tool Company, Defendants in Error. Petition of Frank C. Thornton and The Cleveland Stamping and Tool Company for a Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio. Filed Mar. 6, 1919. Supreme Court of Ohio, Frank E. McKean, Clerk.

8 In the Supreme Court of Ohio.

No. 15,969.

FRANK C. THORNTON, Plaintiff in Error,

vs.

THOMAS J. DUFFY and HERBERT L. ELIOT, Members of and Composing The Industrial Commission of Ohio, and The Cleveland Stamping and Tool Company, Defendants in Error.

Assignment of Errors on Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio.

Now come Frank C. Thornton and The Cleveland Stamping and Tool Company in connection with the petition for a writ of error herein, and respectfully submit that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Ohio in the above entitled action, there is manifest error in this, to-wit:

First. The Supreme Court of the State of Ohio erred in affirming the judgment of the Court of Appeals of Franklin County, Ohio, and in refusing to reverse said judgment and remand this cause to the Court of Appeals of Franklin County, Ohio, for further proceedings.

Second. The Supreme Court of the State of Ohio should have found that said Court of Appeals of Franklin County, Ohio, erred in sustaining the demurrers of said Thomas J. Duffy and Herbert L. Eliot, members of and composing the Industrial Commission of Ohio, to the petition of said Frank C. Thornton and to the cross petition of said The Cleveland Stamping and Tool Company.

9 Third. The judgment of said Supreme Court of Ohio was given for said Thomas J. Duffy and Herbert L. Eliot, members of and composing The Industrial Commission of Ohio, when it ought to have been given for said Frank C. Thornton and The Cleveland Stamping and Tool Company.

Fourth. The judgment of the Supreme Court of the State of Ohio, in this cause, is in contravention of Article XIV, Section 1 of the Constitution of the United States, which declares: "Nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fifth. The judgment of the Supreme Court of the State of Ohio, in this cause, is in contravention of Article I, Section 10 of the Constitution of the United States, which declares: "No State shall pass any law impairing the obligation of contracts."

Sixth. The Supreme Court of the State of Ohio erred in holding that the act of the General Assembly of the State of Ohio, passed February 16, 1917, and approved by the Governor, February 19, 1917, entitled: "An Act to amend section 1465-101 of the General Code of Ohio, making void contracts indemnifying employers against loss or liability for the payment of workmen's compensation, and agreements to pay such compensation, and making void contracts which indemnify the employer against damages when injury, disease or death arises from failure of employer to comply with lawful requirements for the protection of the lives, health and safety of employes, or when the same is occasioned by the wilful act of the employer or any of his officers or agents; prohibiting the issuance of licenses to enter into such contracts; and to repeal original Section 1465-101 of the General Code of Ohio," (107 O. L., pp. 6 & 7)

10 and the authority thereunder exercised by the State of Ohio, are not in contravention of the provisions of Article XIV, Section 1 and Article I, Section 10 of the Constitution of the United States, notwithstanding said act, and the authority thereunder exercised by the State of Ohio, assume to deprive and to deny to said Frank C. Thornton and to said The Cleveland Stamping and Tool Company and to six hundred and seventy-five or more of the employers in the State of Ohio on whose behalf this action was brought, the benefit of existing, lawful contracts, valid before and at the time said act was passed; and said act, and the authority thereunder exercised by the State of Ohio, assume to deny to said Frank C. Thornton and The Cleveland Stamping and Tool Company, and the employers in the State of Ohio in whose behalf this action was brought, the right to make contracts indemnifying them against their liability to employes, and to deny to them their right to exercise their respective desires to insure the payment of the compensation and the services and aid to employes and their dependents, for which they respectively may be liable under Sections 1465-41*a* to 1465-106 General Code of Ohio, known as the Workmen's Compensation Law, and to indemnify themselves against loss sustained by the direct payment thereof, on the sole ground that said employers desire to insure the payment thereof, or indemnify themselves against loss sustained by the direct payment thereof, or that they heretofore have so insured the payment thereof, or have so indemnified themselves.

The provisions of said section 1465-101, as so amended, are as follows, to-wit: "All contracts and agreements shall be absolutely void and of no effect which undertake to indemnify or insure an employer against loss or liability for the payment of compensation to workmen or their dependents, for death, injury or occupational disease occasioned in the course of such workmen's employment, or

which provide that the insurer shall pay such compensation
11 or which indemnify the employer against damages when the injury, disease or death arises from the failure to comply with any lawful requirement for the protection of the lives, health and safety of employes, or when the same is occasioned by the wilful act of the employer or any of his officers or agents, or by which it is agreed that the insurer shall pay any such damages. No license or authority to enter into any such agreements or issue any such policies of insurance shall be granted or issued by any public authority." (107 O. L. p. 7).

Seventh. The Supreme Court of the State of Ohio erred in holding that the provisions of Section 1465-69, General Code of Ohio, as amended by the act of the General Assembly of the State of Ohio, passed March 20, 1917, and approved by the Governor, March 29, 1917, entitled: "An Act to amend sections 871-5, 871-9, 1465-50, 1465-54, 1465-56, 1465-61, 1465-69, 1465-80, 1465-87 and 1465-90 of the General Code, to further define the powers, duties and jurisdiction of the state industrial commission, with reference to the collection, maintenance and disbursement of the state insurance fund for the benefit of injured and the dependents of killed employes and requiring contribution thereto by employers", (107 O. L. pp. 157-164); and the authority thereunder exercised by the State of Ohio, are not in contravention of the provisions of Article XIV, Section 1 and Article I, Section 10 of the Constitution of the United States, notwithstanding said act and the authority thereunder exercised by the State of Ohio, assume to deprive and to deny to said Frank C. Thornton and to said The Cleveland Stamping and Tool Company and to six hundred and seventy-five or more of the employers in the State of Ohio, on whose behalf this action was brought, the benefit of existing, lawful contracts, valid before and at the time said act was passed; and said act and the authority thereunder exercised by the State of Ohio, assume to deny to said Frank C. Thornton and The Cleveland Stamping and Tool Company and the employers in the State of Ohio in whose behalf this action was brought,
12 the right to make contracts indemnifying them against their liability to employes, and to deny to them their right to exercise their respective desires to insure the payment of the compensation and the services and aid to employes and their dependents, for which they respectively may be liable under sections 1465-41a to 1465-108, General Code of Ohio, known as the Workmen's Compensation Law, and to indemnify themselves against loss sustained by the direct payment thereof on the sole ground that said employers desired to insure the payment thereof, or indemnify themselves against loss sustained by the direct payment thereof, or that they heretofore have so insured the payment thereof or have so indemnified themselves.

Said section 1465-69, as so amended, is as follows, to-wit: "Except as hereinafter provided, every employer mentioned in subdivision two of section 1465-69, General Code, shall, in the month of January, 1914, and semi-annually thereafter, pay into the state insurance fund the amount of premium determined and fixed by

the industrial commission of Ohio for the employment or occupation of such employer the amount of which premium to be so paid by each such employer to be determined by the classifications, rules and rates made and published by said commission; and such employer shall semi-annually thereafter pay such further sum of money into the state insurance fund as may be ascertained to be due from him by applying the rules of said commission, and a receipt or certificate certifying that such payment has been made shall immediately be mailed to such employer by the industrial commission of Ohio, which receipt or certificate, attested by the seal of said commission shall be prima facie evidence of the payment of such premium.

Provided, however, that as to all employers who were subscribers to the state insurance fund prior to January 1st, 1914, or who may first become subscribers to said fund in any other months of than) January or July, the foregoing provisions for the payment of such premiums in the month of January, 1914, and semi-annually thereafter shall not apply, but such semi-annual premiums shall be paid by such employers from time to time upon the expiration of the respective periods for which payments into the fund have been made by them. And provided further, that such employers who will abide by the rules of the industrial commission of Ohio and as may be of sufficient financial ability to render certain the payment of compensation to injured employes or to the dependents of killed employes, and the furnishing of medical, surgical, nursing and hospital attention and services and medicines, and funeral expenses equal to or greater than is provided for in section 1465-78 to 1465-89, General Code, and who do not desire to insure the payment thereof or indemnify themselves against loss sustained by the direct payment thereof, may, upon a finding of such fact by the industrial commission of Ohio, elect to pay individually such compensation, and furnish such medical, surgical, nursing and hospital services and attention and funeral expenses directly to such injured or the dependents of such killed employes; and the industrial commission of Ohio may require such security or bond from said employers as it may deem proper, adequate and sufficient to compel, or secure to such injured employes, or to the dependents of such employes as may be killed, the payment of the compensation and expenses herein provided for, which shall in no event be less than that paid or furnished out of the state insurance fund, in similar cases, to injured employes or to dependents of killed employes, who(se) employers contribute to said fund; and should municipal or other bonds be accepted by said commission as security for said payments, such bonds shall be deposited with the treasurer of state whose duty it shall be to have custody thereof and to retain the same in his possession according to the conditions prescribed by the order of said commission accepting the same as security, and said treas-
14 urer shall retain possession of said bonds until such time as he may be directed by said commission as to the mode and manner of his disposition of the same; and said commission shall make and publish rules and regulations governing the mode and manner of making application and the nature and extent of the

proof required to justify such finding of fact by said commission as to permit such election by such employers, which rules and regulations shall be general in their application, one of which rules shall provide that all employers, electing directly to compensate their injured and the dependents of their killed employes as hereinbefore provided, shall pay into the state insurance fund such amount or amounts as are required to be credited to the surplus in paragraph two of section 1465-54, General Code. The industrial commission of Ohio may at any time change or modify its findings of fact herein provided for, if in its judgment such action is necessary or desirable to secure or assure a strict compliance with all of the provisions of the law in reference to the payment of compensation and the furnishing of medical, nurse, and hospital services and medicines and funeral expenses to injured and the dependents of killed employes." (107 O. L., pp. 159-161).

JUDSON HARMON &
VORYS, SATER, SEYMOUR & PEASE,
Attorneys for Frank C. Thornton and The Cleveland Stamping and Tool Company.

15 [Endorsed:] In the Supreme Court of Ohio. No. 15999. Frank C. Thornton, Plaintiff in Error, vs. Thomas J. Duffy and Herbert L. Eliot, Members of and Composing The Industrial Commission of Ohio, and The Cleveland Stamping and Tool Company, Defendants in Error. Assignment of Errors on Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio. Filed Mar. 6, 1919. Supreme Court of Ohio, Frank E. McKean, Clerk.

16 In the Supreme Court of Ohio.

No. 15999.

FRANK C. THORNTON, Plaintiff in Error,

vs.

THOMAS J. DUFFY and HERBERT L. ELIOT, Members of and Composing The Industrial Commission of Ohio, and The Cleveland Stamping and Tool Company, Defendants in Error.

Order Allowing Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio.

On this 5th day of March, 1919, the application of Frank C. Thornton, plaintiff in error, and The Cleveland Stamping and Tool Company, defendant and cross-petitioner in error, for a writ of error, came on to be heard, and it appearing to the court from the petition filed herein and from the record and proceedings filed therewith that said application should be granted, and that a transcript of the record, proceedings and papers, upon which the judgment of the court

was rendered, properly certified, should be sent to the Supreme Court of the United States in accordance with the prayer of said petition, in order that such proceedings may be had as may be just and proper;

Now, Therefore, it is ordered that the writ of error be allowed upon bond being furnished by said Frank C. Thornton and said The Cleveland Stamping and Tool Company conditioned according to law in the sum of $1000.00, which is further to act as a supersedeas, and that a true copy of the record, assignment of errors, and all proceedings in the case in the Supreme Court of the State of Ohio shall be transmitted to the Supreme Court of the United States.

17 duly certified according to law, in order that said court may inspect the same and take such action thereon as it deems proper according to law.

And thereupon said Frank C. Thornton and The Cleveland Stamping and Tool Company having presented their bond, and the same being found to be in accordance with this order, same is hereby approved.

HUGH L. NICHOLS.
Chief Justice of the Supreme Court of the State of Ohio.

18 [Endorsed:] No. 15,999. In the Supreme Court of Ohio. Frank C. Thornton, Plaintiff in Error, vs. Thomas J. Duffy and Herbert L. Eliot, members of and composing The Industrial Commission of Ohio, and The Cleveland Stamping and Tool Company, Defendants in Error. Order Allowing Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio. J. 28, p. 216. Chief Justice of the Supreme Court of the State of Ohio.

19 In the Supreme Court of Ohio.

No. 15,999.

FRANK C. THORNTON, Plaintiff in Error,

vs.

THOMAS J. DUFFY and HERBERT L. ELIOT, Members of and Composing The Industrial Commission of Ohio, and The Cleveland Stamping and Tool Company, Defendants in Error.

Writ of Error from Supreme Court of the United States to the Supreme Court of the State of Ohio.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Ohio, Greeting:

Whereas, in the record and proceedings and in the rendition of the judgment of the above-entitled cause which is now before you,

or some of you, between Frank C. Thornton, plaintiff in error, and Thomas J. Duffy and Herbert L. Eliot, members of and composing The Industrial Commission of Ohio, defendants in error, and The Cleveland Stamping and Tool Company defendant and cross-petitioner in error, your court being the highest court of said State of Ohio having jurisdiction of the cause, there was drawn in question the validity of statutes of the State of Ohio and an authority exercised under said State, on the ground of their being repugnant to the Constitution of the United States, and the decision is in favor of their validity, and whereas there is manifest error in said judgment to the great damage of said Frank C. Thornton and The Cleveland Stamping and Tool Company, and whereas we are willing that if there is error it should be duly corrected, we command you
20 therefore, if judgment be given therein, that you send under seal of your court the record and proceedings in said cause to the Supreme Court of the United States together with this writ, within such time as may be necessary in order that you have the same at Washington on the 4th day of April 1919, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid may be then inspected by the Supreme Court of the United States and that said Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, the 5th day of March A. D. 1919.

[Seal United States District Court, Southern Dis., Ohio.]

B. E. DILLEY,
Clerk of the United States District Court for the Southern District of Ohio, Eastern Division.

Allowed by
HUGH L. NICHOLS,
Chief Justice of the Supreme Court of the State of Ohio.

21 [Endorsed:] No. 15,999. In the Supreme Court of Ohio. Frank C. Thornton, Plaintiff in Error, vs. Thomas J. Duffy and Herbert L. Eliot, Members of and Composing The Industrial Commission of Ohio, and The Cleveland Stamping and Tool Company, Defendants in Error. Writ of Error from Supreme Court of the United States to the Supreme Court of the State of Ohio. Filed Mar. 6, 1919. Supreme Court of Ohio. Frank E. McKean, Clerk.

22 In the Supreme Court of Ohio.

No. 15,999.

FRANK C. THORNTON, Plaintiff in Error,

vs.

THOMAS J. DUFFY and HERBERT L. ELIOT, Members of and Composing The Industrial Commission of Ohio, and The Cleveland Stamping and Tool Company, Defendants in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

To Thomas J. Duffy and Herbert L. Eliot, members of and composing the Industrial Commission of Ohio, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington in the District of Columbia, on the 4th day of April A. D. 1919, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the State of Ohio from a final judgment signed, filed and entered therein on the 31st day of December, 1918, in an action therein pending wherein Frank C. Thornton is plaintiff in error and Thomas J. Duffy and Herbert L. Eliot, members of and composing The Industrial Commission of Ohio, are defendants in error, and The Cleveland Stamping and Tool Company is defendant and cross-petitioner in error, to show cause if any there be, why the judgment rendered against said Frank C. Thornton and said The Cleveland Stamping and Tool Company, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of the State of Ohio.

Dated this 5th day of March 1919.

23 Copy of the above citation received this 6th day of March 1919, at Columbus, Ohio, and the appearance of said Thomas J. Duffy and Herbert L. Eliot, members of and composing The Industrial Commission of Ohio, is hereby entered.

JOHN G. PRICE,
Attorney General of the State of Ohio.
Attorney for Thomas J. Duffy and Herbert L. Eliot, Members of and Composing the Industrial Commission of Ohio.

24 [Endorsed:] In the Supreme Court of Ohio. No. 15,999. Frank C. Thornton, Plaintiff in Error, vs. Thomas J. Duffy and Herbert L. Eliot, Members of and Composing The Industrial Commission of Ohio, and The Cleveland Stamping and Tool Company, Defendants in Error. Citation. Filed Mar. 6, 1919. Supreme Court of Ohio, Frank E. McKean, Clerk.

25 In the Supreme Court of Ohio.

No. 15,999.

FRANK C. THORNTON, Plaintiff in Error,

vs.

THOMAS J. DUFFY and HERBERT L. ELIOT, Members of and Composing The Industrial Commission of Ohio, and The Cleveland Stamping and Tool Company, Defendants in Error.

Stipulation as to Transcript of Record.

COLUMBUS, OHIO, March 6, 1919.

The undersigned counsel for the respective parties in this cause hereby stipulate that the Clerk of the Supreme Court shall make a transcript of, and shall certify and transmit the entire record in this cause, including all pleadings, opinions and proceedings in this court, and a certified copy of the docket and journal entries in this court.

JUDSON HARMON,
VORYS, SATER, SEYMOUR & PEASE,
Attorneys for Frank C. Thornton and The Cleveland Stamping and Tool Company.

JOHN G. PRICE,
Attorney General of Ohio,
Attorney for Thomas J. Duffy and Herbert L. Eliot, Members of and Composing The Industrial Commission of Ohio.
By B. W. GEARLEAF,
Special Counsel.

26 [Endorsed:] In the Supreme Court of Ohio. No. 15,999. Frank C. Thornton, Plaintiff in Error vs. Thomas J. Duffy and Herbert L. Eliot, Members of and Composing The Industrial Commission of Ohio, and The Cleveland Stamping and Tool Company, Defendants in Error. Stipulation as to Transcript of Record. Filed Mar. 6, 1919. Supreme Court of Ohio, Frank E. McKean, Clerk.

27

(Copy.)

No. 15,999.

In the Supreme Court of Ohio.

FRANK C. THORNTON, Plaintiff in Error,

vs.

THOMAS J. DUFFY and HERBERT L. ELIOT, Members of and Composing The Industrial Commission of Ohio, and The Cleveland Stamping and Tool Company, Defendants in Error.

Bond on Writ of Error from the Supreme Court of the United States to the Supreme Court of Ohio.

KNOW All Men By These Presents: That we, Frank C. Thornton and the Cleveland Stamping and Tool Company, as Principals, and The Aetna Casualty & Surety Company, as Surety, are held and firmly bound unto Thomas J. Duffy and Herbert L. Eliot, members of and composing The Industrial Commission of Ohio, in the sum of $1,000.00, to be paid to the said obligees, and their successors in office; to the payment of which, well and truly to be made, we bind ourselves, our successors, administrators and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 5th day of March A. D. 1919.

Whereas the above Frank C. Thornton and The Cleveland Stamping and Tool Company have prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Ohio:

Now, Therefore, the condition of this obligation is such that if the above-named Frank C. Thornton and the Cleveland
28 Stamping and Tool Company shall prosecute their said writ of error to effect and answer all costs and damages if they shall fail to make good their said plea, then this obligation shall be void; otherwise to remain in full force and effect.

FRANK C. THORNTON.
THE CLEVELAND STAMPING & TOOL CO.,
By A. I. VORYS.
[SEAL.]
THE AETNA CASUALTY & SURETY CO.,
By C. A. PIERCE,
Att'y in Fact.

On this 5th day of March, 1919, the above bond having been presented to me for approval, and having examined the same and find-

ing it in conformity to law and the orders of this Court, and sufficient in all respects, I hereby approve the same.

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of the State of Ohio.

[Endorsed:] Filed Mar. 6, 1919. Supreme Court of Ohio, Frank E. McKean, Clerk.

29-31

Supreme Court of Ohio.

Dec. 13, 1918.

No. 15999.

FRANK C. THORNTON, Plaintiff in Error,

vs.

THOMAS J. DUFFY and HERBERT L. ELIOT, Members of and Composing The Industrial Commission of Ohio, and The Cleveland Stamping and Tool Company, Defendants in Error.

Record.

Error to the Court of Appeals of Franklin County, Ohio.

Judson Harmon and Vorys, Sater, Seymour & Pease, Attorneys for Plaintiff in Error, and The Cleveland Stamping and Tool Company, Defendant in Error.

Joseph H. McGhee, Attorney General, Frank Davis, Jr., William J. Ford, Special Counsel, Attorneys for Thomas J. Duffy and Herbert L. Eliot, Members of and Composing The Industrial Commission of Ohio, Defendants in Error.

Filed Jul. 22, 1918. Supreme Court of Ohio. Frank E. McKean, Clerk.

32 Supreme Court of Ohio.

No. 15999.

FRANK C. THORNTON, Plaintiff in Error,

vs.

THOMAS J. DUFFY and HERBERT L. ELIOT, Members of and Composing The Industrial Commission of Ohio, and The Cleveland Stamping and Tool Company, Defendants in Error.

Petition in Error.

(Filed June 1, 1918.)

Frank C. Thornton, plaintiff in error, says that at the January Term 1918 of the Court of Appeals of Franklin County, Ohio, defendants in error, Thomas J. Duffy and Herbert L. Eliot, members of and composing The Industrial Commission of Ohio, recovered a judgment, by the consideration of said court, against plaintiff in error in an action then pending therein, wherein said plaintiff in error was plaintiff and said defendants in error were defendants. A transcript of the docket and journal entries whereof, and the original papers, are filed herewith.

33 There is error in the said record and proceedings in this, to-wit:

(1) Said Court of Appeals erred in sustaining the demurrer of said Thomas J. Duffy and Herbert L. Eliot, members of and composing The Industrial Commission of Ohio, to the petition of said Frank C. Thornton.

(2) Said Court of Appeals erred in refusing to grant said Frank C. Thornton the injunction prayed for in the petition.

(3) Said Court erred in dissolving the temporary injunction.

(4) Said Court erred in refusing to make perpetual the temporary injunction.

(5) The judgment of said Court of Appeals was given for said Thomas J. Duffy and Herbert L. Eliot, members of and composing The Industrial Commission of Ohio, when it ought to have been given for said Frank C. Thornton.

This case involves the question whether the act of the General Assembly of the State of Ohio, passed February 16, 1917, amending Section 1465-101 General Code of Ohio, and the act of the General Assembly of the State of Ohio, passed March 20, 1917, amending Section 1465-69 General Code of Ohio, are in contravention of

the Constitution of the United States and of the Constitution of the State of Ohio, as alleged in the petition of said Frank C. Thornton.

Plaintiff in error therefore prays that said judgment may be reversed, and that he may be restored to all things he has lost by reason thereof.

JUDSON HARMON AND
VORYS, SATER, SEYMOUR & PEASE,
Attorneys for Frank C. Thornton.

34 Summons in error is waived and appearance of defendants in error entered.

JOS. McGHEE,
Attorney General,
DAVIS & FORD,
Attorneys for Thomas J. Duffy and Herbert L. Eliot, Members of and Composing The Industrial Commission of Ohio.
JUDSON HARMON AND
VORYS, SATER, SEYMOUR & PEASE,
Attorneys for The Cleveland Stamping and Tool Company.

Cross-Petition in Error of the Cleveland Stamping and Tool Company.

(Filed June 1, 1918.)

The Cleveland Stamping and Tool Company, defendant in error, says that at the January Term 1918 of the Court of Appeals of Franklin County, Ohio, the defendants in error, Thomas J. Duffy and Herbert L. Eliot, members of and composing the Industrial Commission of Ohio, recovered a judgment, by the consideration of said Court, against this defendant in error, The Cleveland Stamping and Tool Company, in said action pending in said Court of Appeals, wherein said plaintiff in error was plaintiff and said defendants in error were defendants. A transcript of the docket and journal entries whereof, and the original papers, have been filed herein.

35 There is error in said record and proceedings in this, to-wit:

(1) Said Court of Appeals erred in sustaining the demurrer of Thomas J. Duffy and Herbert L. Eliot, members of and composing The Industrial Commission of Ohio, to the answer and cross petition of said The Cleveland Stamping and Tool Company.

(2) Said Court of Appeals erred in refusing to grant said The Cleveland Stamping and Tool Company the injunction prayed for in its answer and cross petition.

(3) Said Court erred in dissolving the temporary injunction.

(4) Said Court erred in refusing to make perpetual the temporary injunction.

(5) The judgment of said Court of Appeals was given for said Thomas J. Duffy and Herbert L. Eliot, members of and composing The Industrial Commission of Ohio, when it ought to have been given for said The Cleveland Stamping and Tool Company.

This case involves the question whether the act of the General Assembly of the State of Ohio, passed February 16, 1917, amending Section 1465-101 General Code of Ohio and the act of the General Assembly of the State of Ohio, passed March 20, 1917, amending Section 1465-61 General Code of Ohio are in contravention of the Constitution of the United States and of the Constitution of the State of Ohio, as alleged in the answer and cross-petition of said The Cleveland Stamping and Tool Company.

Said The Cleveland Stamping and Tool Company therefore prays that said judgment may be reversed and that it may be re-
36 stored to all things it has lost by reason thereof.

JUDSON HARMON AND
VORYS, SATER, SEYMOUR & PEASE,
Attorneys for The Cleveland Stamping and Tool Company.

Summons in error is waived and appearance of defendants in error entered.

JOS. McGHEE,
Attorney General,
DAVIS & FORD,
Attorneys for Thomas J. Duffy and H. L. Eliot, Members of and Composing The Industrial Commission of Ohio.
JUDSON HARMON AND
VORYS, SATER, SEYMOUR & PEASE,
Attorneys for Frank C. Thornton.

Motion.

(Filed June 1, 1918.)

Now come Frank C. Thornton, plaintiff in error, and The Cleveland Stamping and Tool Company, defendant in error, and separately and severally move the Court for a temporary restraining order, as prayed for in the petition.

JUDSON HARMON AND
VORYS, SATER, SEYMOUR & PEASE,
Attorneys for Frank C. Thornton and The Cleveland Stamping and Tool Company.

37

Entry.

(Filed June 6, 1918, Journal 28, p. 90.)

This day this cause came on to be heard upon the motion of the plaintiff in error, Frank C. Thornton, and defendant in error, The Cleveland Stamping and Tool Company, for a temporary restraining order as prayed for in the petition of the said Frank C. Thornton; and the same having been argued by counsel and submitted to the

Court, and the Court being fully advised in the premises, does find that said motion is well taken and doth sustain the same.

It is therefore ordered that during the pendency of this suit, or until the further order of the Court, that said defendants in error Thomas J. Duffy and Herbert L. Eliot, members of and composing The Industrial Commission of Ohio, their associates and successors in office, are hereby restrained from sending the notices described in the petition, and from revoking, changing or modifying the finding of facts issued to plaintiff in error, and the findings of facts issued to all other employers, heretofore made and certified by The Industrial Commission of Ohio to plaintiff in error, Frank C. Thornton, and defendant in error, The Cleveland Stamping and Tool Company, and all other employers described in said petition, who are of sufficient financial ability and credit to render certain the payment of compensation and furnishing the services to employes and their dependents, as provided in Section 1465-69 General Code of Ohio, who maintain the bond required by said Commission, who abide by the rules of said Commission, and who pay the required amounts into the surplus of the State Insurance Fund as
38 provided in said Section; and they are hereby restrained from carrying out and effectuating said resolution of said Commission so adopted December 1, 1917, as described in the petition of said Frank C. Thornton and the answer and cross-petition of The Cleveland Stamping and Tool Company, and from revoking, changing or modifying any findings of facts heretofore made and certified by said Commission to employers on the sole ground that such employer desires to insure, or has insured the payment of compensation to employes, or desires to indemnify, or has indemnified himself against loss sustained by the direct payment thereof.

It is ordered that plaintiff in error, Frank C. Thornton, and defendant in error, The Cleveland Stamping and Tool Company, give their joint and several bond herein in the sum of One Thousand Dollars to be approved by the Clerk of this Court, which is accordingly done.

To which order the said defendants in error, Thomas J. Duffy and Herbert L. Eliot, members of and composing The Industrial Commission of Ohio, except.

39 In the Court of Common Pleas, Franklin County, Ohio.

No. 70276.

FRANK C. THORNTON, Plaintiff,

vs.

THOMAS J. DUFFY and HERBERT L. ELIOT, Members of and Composing The Industrial Commission of Ohio, Defendants.

Petition.

(Filed Dec. 14, 1917.)

Plaintiff is, and during the times hereinafter set forth, has been engaged in business as a manufacturer in the City of Cleveland,

Ohio, and has, and during the times hereinafter set forth continuously has had, more than five and now has more than forty workmen and operatives regularly employed in the same business and in and about his manufacturing establishment, under contracts of hire.

Said Thomas J. Duffy and Herbert L. Eliot are duly appointed and qualified members of The Industrial Commission of Ohio. There is now a vacancy in said Commission and said Duffy and Eliot are the only members of said Commission.

On the — day of January, 1914, upon evidence duly submitted, The Industrial Commission of Ohio duly made its finding
40 of facts and therein certified that plaintiff was of sufficient financial ability and credit to render certain the payment of compensation to injured employes or to the dependents of killed employes and the furnishing of medical, surgical, nursing and hospital attention and services and medicines, and funeral expenses equal to or greater than is provided for in the Act of the General Assembly of the State of Ohio, passed February 26, 1913, and comprised in Sections 1465-41a to 1465-46i General Code of Ohio. Plaintiff thereupon gave the bond, with security required by said Commission and by it deemed proper, adequate and sufficient to guard or secure to the injured employes of plaintiff and the dependents of such of his employes as might be killed, the compensation and benefits provided for in said Act. And plaintiff thereupon duly paid into the State Insurance Fund the amount required by said Commission to be paid by him and credited to the surplus provided for in paragraph two of Section 1465-54, General Code of Ohio. Thereupon on said — day of January, 1914, plaintiff duly elected to pay individually, such compensation and furnish such medical, surgical, nursing and hospital service and attention and funeral expenses directly to the injured and the dependents of the killed employes of plaintiff as provided in Section 1465-69 General Code of Ohio. Since said — day of January, 1914, plaintiff continuously has abided by the rules of The Industrial Commission of Ohio, and continuously has maintained the bond required by said Commission and has continued to pay into the State Insurance Fund the amount required by said Commission to be paid by plaintiff and to be credited to said surplus, and plaintiff continuously has
41 been and is now of sufficient financial ability and credit to render certain the payment of compensation to his injured employes and to the dependents of his killed employes, and the furnishing of medical, surgical, nursing and hospital attention and services and medicines, and funeral expenses equal to and greater than has been and is provided for in said Act and the amendments thereof, and said Commission has not at any time changed, modified or revoked its said finding of facts and the same is in full force and effect.

Thereupon and on the — day of January, 1914, plaintiff made a written and printed contract with the Aetna Life Insurance Company, of Hartford, Connecticut, wherein said Company agreed to pay to the injured employes of plaintiff such amounts for medical,

nurse and hospital services and medicines, and such compensation as were and should be provided by said Act of the General Assembly comprised in Section 1465-41a to Section 1465-106 General Code of Ohio and amendments thereof, and in the event of death of any of plaintiff's employes, such amounts as were and should be provided in said Act and amendments thereof for funeral expenses and for compensation to the dependents or those partially dependent upon such employes, and said Company agreed to indemnify plaintiff against his liability for the payment to his injured employes of the amounts for medical, nurse and hospital services and medicines and the compensation for injured employes and the amounts for funeral expenses and for compensation of those dependent upon his employes as provided in said Act and the amendments thereof.

42 In said contract plaintiff agreed to pay said Company a cash premium, and further agreed to pay said Company on April 29, 1914, an estimated premium computed at an agreed rate upon the estimated pay-roll of wages to be paid by plaintiff to his employes from April 29, 1914, to April 29, 1915, and a like amount annually thereafter until said contract shall have been cancelled in accordance with the provisions in that behalf in said contract, and said contract provided for cancellation thereof by either of the parties thereto, upon thirty days' written notice to the other party of such cancellation, the cancellation to be effective at noon of date specified for cancellation in such notice. It was agreed in said contract that said contract should continue in force until cancelled in accordance with said provision therein for cancellation thereof. It was further agreed in said contract that if the amount of wages paid by plaintiff to his employes should exceed the amount of wages so estimated, plaintiff should pay the Company the additional premium when determined, and if the amount of wages paid by plaintiff to his employes, should be less than the amount of wages so estimated, the Company would return the excess premium when determined. Said contract contained no provision for lapse or forfeiture of the same or of any of plaintiff's rights thereunder, for non-payment of any premium due thereon, and said contract contained no provision whatever for the termination thereof or of any rights of plaintiff thereunder except upon cancellation thereof as aforesaid. Said contract has not been cancelled by either of the parties thereto, and is in full force and effect.

43 At the time of the execution of said contract, to wit, on the — day of January, 1914, said Aetna Life Insurance Company was an insurance company duly licensed to transact business in Ohio, and was duly authorized to make insurance to indemnify employers against loss or damage for personal injury, or death resulting from accidents to employes, as provided in Section 9510, General Code of Ohio, and to make contracts and agreements specifically providing for the payment to injured employes, of the amounts for medical, nurse and hospital services and medicines, and the compensation provided by said Act of the General Assembly of the State of Ohio comprised in Sections 1465-41a to 1465-106, and,

in the event of death, such amounts as are provided in said Act for funeral expenses and for compensation to the dependents or those partially dependent upon such employes, as then provided in Section 1465-101, General Code of Ohio.

On December 1st, 1917, said Thomas J. Duffy and Herbert L. Eliot, as members of and composing The Industrial Commission of Ohio, adopted a resolution of The Industrial Commission of Ohio, which resolution recited the Act of the General Assembly of the State of Ohio, passed February 16th, 1917, amending Section 1465-101 General Code of Ohio, and the Act of the General Assembly of the State of Ohio, passed March 20th, 1917, among other things, amending Section 1465-69 of the General Code of Ohio, and the Act of the General Assembly of the State of Ohio, passed March 21st, 1917, amending Section 9867-2, Paragraph 2, of the General Code of Ohio; and in said resolution it was resolved, determined and declared by The Industrial Commission of Ohio, that no em-
44 ployers shall be permitted to pay or furnish directly to injured employes, or the dependents of killed employes, the compensation and benefits provided in said Act comprised in Sections 1465-81a to 1465-108, General Code of Ohio, if such employers, by contract or otherwise, shall provide for the insurance of the payment by them of such compensation and benefits, or shall indemnify themselves against loss sustained by the direct payment thereof, and that all authorizations or findings of facts theretofore issued by said Commission, authorizing and permitting such employers to pay or furnish said compensation and benefits direct, shall be and stand revoked as of January 10th, 1918, as to all of said employers receiving such authorizations who, on said date of January 10th, 1918, carry any insurance whatever insuring payment or furnishing by them of such compensation and benefits direct, or which in any manner indemnifies said employers against loss sustained by the payment thereof; said resolution provided that on or before December 15th, 1917, notices should be sent to all employers, including plaintiff, so paying compensation and benefits direct, requiring them, as a condition of further enjoying the right so to pay direct, to state in writing that they do not desire to insure such payment direct or to insure themselves against loss sustained by such payment, which notices have not yet been sent.

In pursuance of said resolution said Thomas J. Duffy and Herbert L. Eliot, composing and acting as The Industrial Commission of Ohio, threaten to and will, unless restrained by the order of this Court, send such notices and revoke and hold for naught said
45 finding of facts so made and certified to plaintiff, and upon which plaintiff so made his election to pay and furnish such compensation and medical and other services directly to his employes and the dependents of his killed employes, and will revoke and hold for naught the findings of facts heretofore certified by said Commission to other employers who have elected to pay and furnish such compensation and services directly to employes and their dependents and who have contracts with insurance companies similar to said contract of the plaintiff with said Aetna Life Insur-

ance Company, providing for the payment of such compensation and the furnishing of such services and indemnifying such employers against their liability for the same, and will refuse to make and certify the findings of facts as provided in said Section 1465-69, to employers of sufficient financial ability and credit to render certain the payment of compensation to injured employes, or to dependents of killed employes, and the furnishing of medical, surgical, nursing and hospital attention, nurses and medicines and funeral expenses equal to that provided in said Act comprised in said Sections 1465-41*a* to 1465-106, and who abide by the rules of said Commission and give the bond required by the Commission and pay into the State Insurance Fund the amount required by the Commission to be credited to the surplus as provided in said Section 1465-69, if such employers have entered into or shall desire to enter into any contracts indemnifying the employer against loss or liability for the payment of compensation to their employes or workmen, or their dependents, for death, injury or occupational disease occasioned in
the course of such employes' or workmen's employment, or
46 which provide for payment of such compensation, or if such
employer has made or desires to make any contract which in any manner indemnifies him against his liability for such compensation, or for furnishing such services, or provides for the payment of such compensation or the furnishing of such services by any one other than such employer.

Said defendants so threaten and intend to send said notices and to revoke and refuse such findings of facts upon the sole ground that it is the duty of The Industrial Commission of Ohio under said Acts of the General Assembly of Ohio of February 16th, 1917, and March 20th, 1917, and of March 21st, 1917, to make such revocation and refuse such certificate of such findings of facts of employers who have or desire any such contracts of indemnity, or providing for such payment of compensation and furnishing such services, notwithstanding such employers may be of said financial ability and credit, and may give such required bond, and may abide by the rules of said Commission and may pay into the State Insurance Fund the required amount to be credited to said surplus, and such employers may desire to so elect to pay individually such compensation and furnish such services directly to injured employes and the dependents of killed employes.

Plaintiff avers that said contract of plaintiff and said Aetna Life Insurance Company is a valid, subsisting contract, and plaintiff has the right to maintain said contract as a means of meeting his liability to his employes, and has the right to continue said contract until the same shall be cancelled, as therein provided, by one of the parties
thereto; and plaintiff has the right to cancel said contract and
47 make a contract or contracts with other individuals in Ohio
or elsewhere, to indemnify plaintiff against loss or liability for the payment of compensation to workmen or their dependents, for death, injury or occupational disease occasioned in the course of such workmen's employment, and a contract or contracts providing for the payment and furnishing by others of the compensation and

services due from plaintiff to his employes under said Sections 1465-41*a* to 1465-106.

The sending of said notice and the revocation of said finding of facts so certified by said Commission to plaintiff, and the refusal of said Commission to make and certify to plaintiff its findings of facts as provided in said Section 1465-69, will cause the plaintiff irreparable injury and damage, for which plaintiff has no adequate remedy at law.

There are in Ohio more than 675 employers, in whose behalf respectively said Commission has heretofore made and certified its findings of facts as provided in said Section 1465-69, and who have made and are holding contracts with insurance companies, duly authorized to make the same at the time when such contracts were made, providing for payment of compensation and furnishing services by such insurance companies and indemnifying such employers in the same manner as herein set forth with respect to the contract of plaintiff with said Aetna Life Insurance Company, and which employers claim the right to continue such contracts without forfeiting their right to such findings of facts, and their right to pay such compensation and furnish said services to employes directly. There are many employers in Ohio in whose behalf respectively said
48 Commission has made and certified such findings of facts and who do not have any such contracts with insurance companies, but who claim the right to make contracts with other individuals providing for the payment of such compensation and furnishing of such services by others than such employers, without forfeiting their right to such findings of facts and their right to pay such compensation and furnish such services directly to employes as provided in said Section 1465-69. There are many employers in Ohio who are paying into the State Insurance Fund, as provided in said Section 1465-69, but who are of sufficient financial ability and credit to render certain the payment of compensation and the furnishing of services as provided in said Section 1465-69, and they respectively claim the right to a finding of facts of said Commission, as provided in Section 1465-69, whenever they so desire, and the right to elect to pay such compensation and render such services directly to their employes upon their abiding by the rules of said Commission, giving the required bond, and paying the required amount into said surplus as required by said Section; and they further claim the right, upon making such election, to make contracts with other individuals in Ohio or elsewhere, providing for the payment of the compensation and furnishing the services as required by said Act, by others than such employer, and the indemnifying such employer against his liability for such compensation and services. The question is one of common and general interest of plaintiff and all such employers, who are very numerous, and it is impracticable to bring them all before the Court, and plaintiff sues for the benefit of all said employers.

49 Said Act of the General Assembly of the State of Ohio, passed February 16th, 1917, amending said Section 1465-101, and said provision in the Act of the General Assembly of the State

of Ohio, passed March 20th, 1917, amending said Section 1465-69, were not intended to apply and do not apply to contracts of insurance or indemnity existing when said Acts took effect, or to such contracts entered into by employers with individuals, and were not intended to and do not authorize or empower said Commission to refuse, revoke or cancel authorizations of employers to pay direct the compensation and benefits provided by law for employes and their dependents, upon the finding by said Commission that such employers desire to insure the payment thereof or indemnify themselves against loss sustained by such payment. And if it shall be determined that said Acts were intended to and do so apply, then said Acts and said resolution and notices and threatened action of The Industrial Commission of Ohio are unconstitutional, null and void, in that the same are in contravention of Article XIV, Section 1, of the Constitution of the United States which declares, "Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law;" of Article 1, Section 10 of said Constitution which declares, "No state shall pass any law impairing the obligation of contracts," and of Article I, Section 1, of the Constitution of Ohio which declares that "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety;" and of Article 1, Section 19, of the Constitution of Ohio which declares, "Private property shall ever be held inviolate," and of Article II, Section 28, of the Constitution of Ohio, which declares, "The General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts."

Plaintiff has duly applied to said Commission by petition for a hearing on the lawfulness of said resolution and action of said Commission, and raised every issue on said hearing raised in this action, and said Commission refused to revoke or modify its said resolution and action.

Wherefore, plaintiff prays that said Thomas J. Duffy and Herbert L. Eliot, and their associates and successors in office, acting as The Industrial Commission of Ohio, be perpetually enjoined from sending said notices and from revoking, changing or modifying said findings of facts so made and certified by said Commission to plaintiff, and from carrying out and effectuating said resolution of said Commission of December 1st, 1917, and from revoking, changing or modifying its findings of facts for and on behalf of any employer who is of sufficient financial ability and credit to render certain the payment of compensation and furnishing the services to employes and their dependents, as provided in said Section 1465-69, and who maintain the bond required by the Commission, abide by the rules of the Commission, and pay the required amounts into the surplus of the State Insurance Fund as provided in said Section; and from refusing the finding of facts of said Commission to employers who

51 may desire to pay compensation and furnish services directly to employes and their dependents as provided in said Section, and who show to the Commission that they are of sufficient financial ability and credit to so render certain the payment of such compensation and the furnishing of such services, and who give the required bond and abide by the rules of the Commission, and pay the required amounts into the surplus of the State Insurance Fund as provided in said Section; and from revoking, changing or modifying any finding of facts heretofore made and certified by said Commission, or refusing or withholding the finding of facts of said Commission from any employer on the sole ground that such employer desires to insure the payment of compensation to employes, or to indemnify himself against loss sustained by the direct payment thereof.

Plaintiff further prays that temporarily, and pending this suit, an injunction may issue, restraining said defendants, their associates and successors, from sending said notices and from so revoking, changing or modifying or refusing any such finding of facts, and plaintiff prays *from* such other and further relief to which he may be entitled.

JUDSON HARMON AND
VORYS, SATER, SEYMOUR & PEASE,
Attorneys for Plaintiff.

(Duly verified.)

52 *Motion.*

(Filed Dec. 14, 1917.)

Plaintiff moves the Court for a temporary restraining order as prayed for in the petition.

JUDSON HARMON AND
VORYS, SATER, SEYMOUR & PEASE,
Attorneys for Plaintiff.

Motion.

(Filed Feb. 12, 1918.)

Now come the defendants and make this their motion in the above entitled cause:

I.

Defendants move that the temporary restraining order heretofore issued in said cause be dissolved and set aside, for the reason that the petition is said cause does not state any cause of action either at law or in equity, and does not state any facts which warrant the court in entering and issuing said temporarary restraining order.

II.

As the second branch of their motion herein, defendants move that in the event the first branch of their motion herein be not sustained, that so much of said restraining order, entered and issued by the court as aforesaid, as restrains defendants from sending the notices described in the petition to employers other than plaintiff, mentioned in said petition, and restrains defendants from revoking, changing or modifying the finding of facts issued to such
53 employers other than the plaintiff, and restrains the defendants from carrying out and effectuating said resolution of defendants, as The Industrial Commission of Ohio, as to employers other than plaintiff, be dissolved, set aside and held for naught, for the reason that plaintiff has no interest, either at law or in equity, with respect to any action to be taken by the defendants, as The Industrial Commission of Ohio, with respect to employers mentioned in said petition, other than himself, and for the reason that neither at law nor in equity is plaintiff entitled to bring this acton on behalf of said employers mentioned in said petition and order, other than himself.

JOSEPH McGHEE,
Attorney General;
FRANK DAVIS, JR.,
WM. J. FORD,
Of Counsel,
Attorneys for the Defendants.

Demurrer.

(Filed Feb. 21, 1918.)

Now come the defendants and demur to the petition of plaintiff herein, for the reason that said petition does not state facts which show a cause of action.

JOSEPH McGHEE,
Attorney General;
FRANK DAVIS, JR.,
WM. J. FORD,
Of Counsel.

54 *Motion.*

(Filed April 9, 1918.)

Now comes The Cleveland Stamping and Tool Company, a corporation, and moves the Court for an order permitting it to be made a party defendant herein, with leave to file instanter its answer and cross petition, which said answer and cross petition is tendered herewith and made a part hereof.

JUDSON HARMON AND
VORYS, SATER, SEYMOUR & PEASE,
Attorneys for the Cleveland Stamping and Tool Company.

Answer and Cross-Petition of the Cleveland Stamping and Tool Company.

(Filed April 9, 1918.)

The Cleveland Stamping and Tool Company is a corporation organized under the laws of Ohio, and is, and during the times hereinafter set forth has been, engaged in business as a manufacturer in the City of Cleveland, Ohio, and has, and during the times hereinafter set forth continuously has had, more than five workmen and operatives regularly employed in the same business and in and about its manufacturing establishment, under contracts of hire.

On the 8th day of January, 1914, upon evidence duly submitted, The Industrial Commission of Ohio duly made its finding of facts therein certified that said Company was of sufficient financial
55 ability and credit to render certain the payment of compensation to injured employees or to the dependents of killed employes and the furnishing of medical, surgical, nursing and hospital attention and services and medicines, and funeral expenses equal to or greater than is provided for in the Act of the General Assembly of the State of Ohio, passed February 26, 1913, and comprised in Sections 1465-41*a* to 1465-106 General Code of Ohio. Said Company thereupon gave the bond, with security required by said Commission and by it deemed proper, adequate and sufficient to compel or secure to the injured employes of plaintiff and the dependents of such of said Company's employes as might be killed, the compensation and benefits provided for in said Act. Said Company thereupon duly paid into the State Insurance Fund the amount required by said Commission to be paid by it and credited to the surplus provided for in paragraph two of Section 1465-54, General Code of Ohio. Thereupon, on said 8th day of January, 1914, said Company duly elected to pay individually, such compensation and furnish such medical, surgical, nursing and hospital services and attention and funeral expenses directly to the injured and the dependents of the killed employes of said Company as provided in Section 1465-69 General Code of Ohio. Since said 8th day of January, 1914, said Company continuously has abided by the rules of The Industrial Commission of Ohio, and continuously has maintained the bond required by said Commission and has continued to pay into the State Insurance Fund the amount required by said Commission to be paid by it and to be credited to said surplus, and
56 said Company continuously has been and is now of sufficient financial ability and credit to render certain the payment of compensation to its injured employes and to the dependents of its killed employes, and the furnishing of medical, surgical, nursing and hospital attention and services and medicines, and funeral expenses equal to and greater than has been and is provided for in said Act and the amendments thereof, and said Commission has not at any time changed, modified or revoked its said finding of facts and the same is in full force and effect.

Thereupon, and on the — day of January, 1914, said Company made a written and printed contract with the Aetna Life Insurance Company, of Hartford, Connecticut, wherein said Aetna Life Insurance Company agreed to pay to the injured employes of this Company such amounts for medical, nurse and hospital services, and medicines, and such compensation as were and should be provided by said Act of the General Assembly comprised in Section 1465-41*a* to Section 1465-106 General Code of Ohio and amendments thereof, and in the event of death of any of this Company's employes, such amounts as were and should be provided in said Act and amendments thereof for funeral expenses and for compensation to the dependents or those partially dependent upon such employes, and said Aetna Life Insurance Company agreed to indemnify this Company against its liability for the payment to its injured employes of the amounts for medical, nurse and hospital services and medicines and the compensation for injured employes and the amounts for funeral expenses and for compensation of those dependent upon its employes as provided in said Act and the amendments thereof.

57 In said contract this Company agreed to pay said Insurance Company a cash premium, and further agreed to pay said Insurance Company on March 1st, 1914, an estimated premium computed at an agreed rate upon the estimated pay-roll of wages to be paid by this Company to its employees from March 1st, 1914, to March 1st, 1915, and a like amount annually thereafter until said contract shall have been cancelled in accordance with the provisions in that behalf in said contract; and said contract provided for cancellation thereof by either of the parties thereto, upon thirty days written notice to the other party of such cancellation, the cancellation to be effective at noon of date specified for cancellation in such notice. It was agreed in said contract that said contract should continue in force until cancelled in accordance with said provision therein for cancellation thereof. It is further agreed in said contract that if the amount of wages paid by the Company to its employes should exceed the amount of wages so estimated, this Company should pay said Insurance Company the additional premium when determined, and if the amount of wages paid by said Company to its employes should be less than the amount of wages so estimated, said insurance Company would return the excess premium when determined. Said contract contained no provision for lapse or forfeiture of the same or of any of the Company's rights thereunder, for non-payment of any premium due thereon, and said contract contained no provision whatever for the termination thereof or of any rights of this Company thereunder, except upon cancellation thereof as aforesaid.

58 Said contract has not been cancelled by either of the parties thereto, and this Company has performed all the agreements therein by it to be performed, and said contract is in full force and effect.

At the time of the execution of said contract, to-wit, on the—day of January, 1914, said Aetna Life Insurance Company was an insurance company duly licensed to transact business in Ohio, and was duly authorized to make insurance to indemnify employers against

loss or damage for personal injury, or death resulting from accidents to employes, as provided in Section 9510, General Code of Ohio, and to make contracts and agreements specifically providing for the payment to injured employes, of the amounts for medical, nurse and hospital services and medicines, and the compensation provided by said act of the General Assembly of the State of Ohio comprised in Sections 1465-41*a* to 1465-106, and, in the event of death, such amounts as are provided in said act for funeral expenses and for compensation to the dependents or those partially dependent upon such employes, as then provided in Section 1465-101, General Code of Ohio.

On December 1st, 1917, said Thomas J. Duffy and Herbert L. Eliot, as members of and composing The Industrial Commission of Ohio, adopted a resolution of The Industrial Commission of Ohio, which resolution recited the act of the General Assembly of the State of Ohio, passed February 16th, 1917, amending Section 1465-101 General Code of Ohio, and the act of the General Assembly of the State of Ohio, passed March 20th, 1917, among other things, amending Section 1465-69 of the General Code of Ohio, and the act of the General Assembly of the State of Ohio, passed March 21st 1917, amending Section 9607-2, Paragraph 2, of the General Code of Ohio;
59 and in said resolution it was resolved, determined and declared by The Industrial Commission of Ohio, that no employers shall be permitted to pay or furnish directly to injured employes, or the dependents of killed employes, the compensation and benefits provided in said act comprised in Sections 1465-41*a* to 1465-106, General Code of Ohio, if such employers, by contract or otherwise, shall provide for the insurance of the payment by them of such compensation and benefits, or shall indemnify themselves against loss sustained by the direct payment thereof, and that all authorizations on findings of facts theretofore issued by said Commission, authorizing and permitting such employers to pay or furnish said compensation and benefits direct, shall be and stand revoked as of January 10th, 1918, as to all of said employers receiving such authorizations, who, on said date of January 10th, 1918, carry any insurance whatever insuring payment or furnishing by them of such compensation and benefits direct, or which in any manner indemnifies said employers against loss sustained by the payment thereof; said resolution provided that on or before December 15th, 1917, notices should be sent to all employers, including this Company, so paying compensation and benefits direct, requiring them, as a condition of further enjoying the right so to pay direct, to state in writing that they do not desire to insure such payment direct or to insure themselves against loss sustained by such payment, which notices have not yet been sent.

In pursuance of said resolution said Thomas J. Duffy, and Herbert L. Eliot and J. D. Clark, who has become a member of said
60 Commission, composing and acting as The Industrial Commission of Ohio, threaten to and will, unless restrained by the order of this Court, send such notices and revoke and hold for naught said finding of facts so made and certified to this Company

and upon which this Company so made its election to pay and furnish such compensation and medical and other services directly to its employes and the dependents of its killed employes, and will revoke and hold for naught the findings of facts heretofore certified by said Commission to other employers who have elected to pay and furnish such compensation and services directly to employes and their dependents and who have contracts with insurance companies similar to said contract of this Company with said Aetna Life Insurance Company, providing for the payment of such compensation and the furnishing of such services and indemnifying such employers against their liability for the same, and will refuse to make and certify the findings of facts as provided in said Section 1465-69, to employers of sufficient financial ability and credit to render certain the payment of compensation to injured employes, or to dependents of killed employes, and the furnishing of medical, surgical, nursing and hospital attention, nurses and medicines and funeral expenses equal to that provided in said act comprised in said Sections 1465-41*a* to 1465-106, and who abide by the rules of said Commission and give the bond required by the Commission and pay into the State Insurance Fund the amount required by the Commission to be credited to the surplus as provided in said Section 1465-69, if such employers have entered into or shall desire to enter into any contracts indemnifying the employer against loss or liability for the payment of com-
61 pensation to their employes or workmen, or their dependents, for death, injury or occupational disease occasioned in the course of such employes' or workmen's employment, or which provide for payment of such compensation, or if such employer has made or desires to make any contract which in any manner indemnifies such employer against liability for such compensation, or for furnishing such services, or provides for the payment of such compensation or the furnishing of such services by any one other than such employer.

Said defendants so threaten and intend to send said notices and to revoke and refuse such findings of facts upon the sole ground that it is the duty of The Industrial Commission of Ohio under said acts of the General Assembly of Ohio of February 16th, 1917 and March 20th, 1917, and of March 21st, 1917, to make such revocation and refuse such certificate of such findings of facts of employers who have or desire any such contracts of indemnity, or providing for such payment of compensation and furnishing such services, notwithstanding such employers may be of said financial ability and credit, and may give such required bond, and may abide by the rules of said Commission, and may pay into the State Insurance Fund the required amount to be credited to said surplus, and such employers may desire to so elect to pay individually such compensation and furnish such services directly to injured employes and the dependents of killed employes.

Said contract of this company and said Aetna Life Insurance Company is a valid, subsisting contract, and this company has the right to maintain said contract as a means of meeting its liability to its employes, and has the right to continue said contract until the
62 same shall be cancelled, as therein provided, by one of the parties thereto; and this company has the right to cancel said

contract and make a contract or contracts, (other than contracts in Ohio with corporations engaged in the business of insurance), indemnifying this company against loss or liability for the payment of compensation to workmen or their dependents, for death, injury or occupational disease occasioned in the course of such workmen's employment, and a contract or contracts providing for the payment and furnishing by others of the compensation and services due from this company to its employes under said Sections 1465-41*a* to 1465-106

The sending of said notice and the revocation of said finding of facts so certified by said Commission to this company, and the refusal of said Commission to make and certify to this company its findings of facts as provided in said Section 1465-69, will cause this company irreparable injury and damage, for it has no adequate remedy at law.

There are in Ohio more than 675 employers, in whose behalf respectively said Commission has heretofore made and certified its findings of facts as provided in said Section 1465-69, and who have made and are holding contracts with insurance companies, duly authorized to make the same at the time when such contracts were made, providing for payment of compensation and furnishing services by such insurance companies and indemnifying such employers in the same manner as herein set forth with respect to the contract of this company with said Aetna Life Insurance Company, and which employers claim the right to continue such contracts without forfeiting their right to such findings of facts, and their right to pay such
63 compensation and furnish said services to employes directly.

There are many employers in Ohio in whose behalf respectively said Commission has made and certified such findings of facts and who do not have any such contracts with insurance companies, but who claim the right to make contracts with other individuals providing for the payment of such compensation and furnishing of such services by others than such employers, without forfeiting their right to such findings of facts and their right to pay such compensation and furnish such services directly to employes as provided in said Section 1465-69. There are many employers in Ohio who are paying into the State Insurance Fund, as provided in said Section 1465-69, but who are of sufficient financial ability and credit to render certain the payment of compensation and the furnishing of services as provided in said Section 1465-69, and they respectively claim the right to a finding of facts of said Commission, as provided in Section 1465-69, whenever they so desire, and the right to elect to pay such compensation and render such services directly to their employes upon their abiding by the rules of said Commission, giving the required bond, and paying the required amount into said surplus as required by said Section; and they further claim the right, upon making such election, to make contracts (other than contracts in Ohio with corporations engaged in the business of insurance), providing for the payment of the compensation and furnishing the services as required by said act, by others than such employer, and indemnifying such employer against his liability for such compensation and services.

The question is one of common and general interest of this
64 company and all such employers, who are very numerous, and it is impracticable to bring them all before the Court, and this company files this answer and cross-petition for the benefit of itself and all said employers.

Said act of General Assembly of the State of Ohio, passed February 16th, 1917, amending said Section 1465-101, and said provision in the act of the General Assembly of the State of Ohio passed March 20th, 1917, amending said Section 1465-69, were not intended to apply and do not apply to contracts of insurance or indemnity existing when said acts took effect, or to any such contracts entered into by employers, except contracts made in Ohio after said acts took effect, with corporations engaged in the business of insurance, and were not intended to and do not authorize or empower said Commission to refuse, revoke or cancel authorizations, of employers to pay direct the compensation and benefits provided by law for employes and their dependents, upon the finding by said Commission that such employers desire to insure the payment thereof or indemnify themselves against loss sustained by such payment. And if it shall be determined that said acts were intended to and do so apply, then said acts and said resolution and notices and threatened action of The Industrial Commission of Ohio are unconstitutional, null and void, in that the same are in contravention of Article XIV, Section, 1 of the Constitution of the United States, which declares, "Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law;" of Article I, Section 10 of said Constitution, which declares, "No state shall pass any law impairing
65 the obligations of contracts," and of Article I, Section 1, of the Constitution of Ohio, which declares, "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety;" and of Article I, Section 19, of the Constitution of Ohio which declares, "Private property shall ever be held inviolate," and of Article II, Section 28, of the Constitution of Ohio, which declares, "The General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts."

Wherefore, this Company, The Cleveland Stamping and Tool Company, prays that said Thomas J. Duffy and Herbert L. Eliot, and their associates and successors in office, acting as The Industrial Commission of Ohio, be perpetually enjoined from sending said notices and from revoking, changing or modifying said findings of facts so made and certified by said Commission to this company, and from carrying out and effectuating said resolution of said Commission of December 1st, 1917, and from revoking, changing or modifying its findings of facts for and on behalf of any employer who is of sufficient financial ability and credit to render certain the payment of compensation and furnishing the services to employes and their dependents, as provided in said Section 1465-69, and who maintain the bond required by the Commission, abide by the rules of the Commission,

and pay the required amounts into the surplus of the State Insurance Fund as provided in said Section; and from refusing the finding of facts of said Commission to employers who may desire
65 to pay compensation and furnish services directly to employes and their dependents as provided in said Section, and who show to the Commission that they are of sufficient financial ability and credit to so render certain the payment of such compensation and the furnishings of such services, and who give the required bond and abide by the rules of the Commission, and pay the required amounts into the surplus of the State Insurance Fund as provided in said Section; and from revoking, changing or modifying any finding of facts heretofore made and certified by said Commission, or refusing or withholding the finding of facts of said Commission from any employer on the sole ground that such employer desires to insure the payment of compensation to employes, or to indemnify himself against loss sustained by the direct payment thereof.

This company further prays that temporarily and pending this suit, the injunction herein may be continued, restraining said defendants, their associates and successors, from sending said notices and from so revoking, changing, or modifying or refusing any such finding of facts, and prays for such other and further relief to which it may be entitled.

VORYS, SATER, SEYMOUR &
PEASE AND JUDSON HARMON,
Attorneys for the Cleveland Stamping and Tool Company.

(Duly verified.)

67 *Demurrer.*

(Filed April 11, 1918.)

Now come the defendants and demur to the answer and cross petition, so called, of The Cleveland Stamping and Tool Co., filed herein for the reason that the same does not state or show facts sufficient to constitute a cause of action against said defendants.

JOS. McGHEE,
Attorney General;
FRANK DAVIS, JR.,
WM. J. FORD,
Special Counsel for Defendants.

GEO. R. OKEY,
T. S. HOGAN,
Of Counsel.

Transcript of Docket and Journal Entries.

In Common Pleas Court.

1917.

Dec. 14—Petition, Affidavit and Precipe filed.
Dec. 14—Summons issued Sheriff Franklin County, Ohio. Ret. Dec. 24, 1917; Ans. Jan. 12, 1918.

Dec. 14—Motion of Plaintiff filed.
Dec. 14—Notice of Plaintiff filed.
Dec. 14—Temporary Restraining Order allowance Bond as entry, 186-521.
Dec. 14—Injunction Bond filed.
Dec. 14—Precipe filed. Order init. copy of Entry issued Sheriff Franklin County, Ohio. Ret. Dec. 24, 1917.

68

1918.

Feb. 12—Motion of Defendants filed.
Feb. 12—Demurrer of Defendants filed.
April 9—Motion of Cleveland Stamping & Tool Co. filed.
April 9—Cleveland Stamping & Tool Co. made party defendants as entry ex.—191-327.
April 9—Answer and cross petition of The Cleveland Stamping & Tool Co. filed.
April 11—Demurrer of Defendant filed.
April 13—Restraining order dissolved as entry ex. appeal bond $500.00—191-348.

Entry Filed December 14, 1917.

186-521.

This day this cause came on to be heard upon the motion of the plaintiff for a temporary restraining order as prayed for in petition, and the same having been argued by counsel and submitted to the court, and the court being fully advised in the premises, does find that said motion is well taken and doth sustain the same.

It is therefore ordered, that during the pendency of this suit or until further order of the Court, that said defendants, Thomas J. Duffy and Herbert L. Eliot, members of and composing The Industrial Commission of Ohio, their associates and successors in office, are hereby restrained from sending the notices described in the petition, and from revoking, changing or modifying the finding of facts issued to plaintiff, and the finding of facts issued to all other employers, heretofore made and certified by The Industrial Commission of Ohio, to plaintiff and all other employers described in said petition who are of sufficient financial ability and credit to render certain the payment of compensation and furnishing the
69 services to employes and their dependents as provided in sections 1465-69 General Code of Ohio, who maintain the bond required by said Commission, who abide by the rules of said Commission and who pay the required amounts into the surplus of The State Insurance Fund as provided in said section; and are restrained from carrying out and effectuating said resolution of said Commission adopted December 1, 1917, as described in the petition, and from revoking, changing or modifying any finding of facts heretofore made and certified by said Commission to employers on the sole ground that such employer desires to insure or has insured, the

payment of compensation to employes, or desires to indemnify or has now indemnified, himself against loss sustained by the direct payment thereof.

This order shall be effective upon the plaintiff giving bond in the sum of $200.00.

To all of which findings and orders the defendants at the time excepted and still except.

Entry Filed April 9, 1918.

191-327.

This day this cause came on to be heard upon the motion of The Cleveland Stamping and Tool Company for leave to be made a party herein, and for leave to file its answer and cross petition herein, instanter, and the same having been argued by counsel and submitted to the court and the court being fully advised, does sustain said motion and does order that said The Cleveland Stamping and Tool Company be, and hereby is made a party herein and is hereby given leave to file its answer and cross-petition herein instanter, to which order the defendants at the time excepted and still except.

70 Entry Filed April 13, 1918.

191-348.

This day this cause came on to be heard upon the motion of defendants, Thomas J. Duffy and Herbert L. Eliot, members of and composing The Industrial Commission of Ohio, to dissolve and set aside the temporary restraining order heretofore issued in this cause, and the court having heard the arguments of counsel, and being fully advised in the premises, does find that said motion is well taken and does sustain the same. It is therefore ordered that the temporary restraining order heretofore issued in this cause be, and the same hereby is dissolved and set aside, to which order of the Court the plaintiff, Frank C. Thornton and the defendant, The Cleveland Stamping and Tool Company, at the time excepted and still except.

Upon application of the plaintiff, Frank C. Thornton, and for good cause, shown, the court further orders that the operation of its said order so dissolving said temporary restraining order shall be suspended for ten (10) days from the entry hereof, within which period of suspension, plaintiff, Frank C. Thornton, and the defendant, The Cleveland Stamping and Tool Company, may separately and severally perfect their appeals.

This cause this day came on further to be heard upon the demurrers of the defendants, Thomas J. Duffy and Herbert L. Eliot, members of and composing The Industrial Commission of Ohio, to the petition of the plaintiff herein and to the answer and cross-petition of the defendant, The Cleveland Stamping and Tool Company, and the Court, having heard the arguments of counsel thereon, and being

fully advised in the premises does find that each of said
71 demurrers is well taken and does sustain the same, to which order of the Court, the plaintiff, Frank C. Thornton, and the defendant, The Cleveland Stamping and Tool Company, each separately and severally excepted, and still except.

The plaintiff, Frank C. Thornton, not desiring to amend or further plead, it is hereby ordered and adjudged by the court that his said petition be, and the same hereby is, dismissed, and it is ordered that the defendants, Thomas J. Duffy and Herbert L. Eliot members of and composing the Industrial Commission of Ohio, go hence without day and recover their costs herein expended; and it is further ordered that the plaintiff, Frank C. Thornton, pay his costs herein taxed at $—, to all of which orders and judgments of the court, the plaintiff, Frank C. Thornton, at the time excepted, and still excepts.

The defendant, The Cleveland Stamping and Tool Company, not desiring to amend or further plead, it is hereby ordered that the answer and cross-petition of said defendant, The Cleveland Stamping and Tool Company be, and the same hereby is dismissed, and that it pay its costs herein taxed at $1—; to all of which orders and judgments said defendant, The Cleveland Stamping and Tool Company, at the time excepted, and still excepts.

The plaintiff, Frank C. Thornton, and the defendant, The Cleveland Stamping and Tool Company, having each separately and severally given notice of intention to appeal this cause to the Court of Appeals, it is ordered that the appeal bond, as to each of said parties, be fixed at Five Hundred Dollars ($500.00).

(Duly certified.)

72 In the Court of Appeals of Franklin County, Ohio.

No. 599.

FRANK C. THORNTON, Plaintiff,

vs.

THOMAS J. DUFFY ET AL., Defendants.

Motion.

(Filed April 24, 1918.)

Now comes the plaintiff, Frank C. Thornton, and the defendant, The Cleveland Stamping and Tool Company, and jointly and severally move the Court for a temporary restraining order as prayed for in the petition.

JUDSON HARMON AND
VORYS, SATER, SEYMOUR & PEASE,
Attorneys for Frank C. Thornton, and
The Cleveland Stamping and Tool Co.

Demurrer.

(Filed May 3, 1918.)

Now come the defendants and demur to the petition of plaintiff herein, for the reason that said petition does not state or
73 show facts sufficient to constitute a cause for action against said defendants.

JOSEPH McGHEE,
Attorney Gen. of Ohio,
FRANK DAVIS, JR.,
Special Counsel,
WM. J. FORD,
Special Counsel,
Attorneys for Defendants.

Demurrer.

(Filed May 3, 1918.)

Now come the defendants and demur to the answer and cross-petition, so-called, of The Cleveland Stamping and Tool Company, filed herein, for the reason that the same does not state or show facts sufficient to constitute a cause of action against said defendants.

JOSEPH McGHEE,
Attorney Gen. of Ohio,
FRANK DAVIS, JR.,
Special Counsel,
WM. J. FORD,
Special Counsel,
Attorneys for Defendants.

Motion.

(Filed May 3, 1918.)

Now come the defendants and make this their motion in the above entitled cause:

74 (1.) As the first branch of their motion herein the defendants move that the temporary restraining order heretofore entered and issued in said cause upon the motion of said plaintiff and The Cleveland Stamping and Tool Company be dissolved and set aside, for the reason that neither the petition in said cause nor the answer and cross-petition of The Cleveland Stamping and Tool Company states any cause of action either at law or in equity and does not state any facts which warranted the Court in entering and issuing said temporary restraining order.

(2.) As the second branch of their motion herein the defendants move that in the event the first branch of their motion herein be not sustained, so much of such restraining order entered and issued by

the Court as aforesaid as restrains defendants, as members of and composing the Industrial Commission of Ohio, from sending the notices described in the petition to employers mentioned in said petition, other than plaintiff and The Cleveland Stamping and Tool Company, and restrains the defendants from revoking, changing or modifying the finding of facts issued to such employers, other than the plaintiff and The Cleveland Stamping and Tool Company, and restrains the defendants from carrying out and effectuating said resolution of defendants, as the Industrial Commission of Ohio, mentioned in said petition as to employers other than plaintiff and The Cleveland Stamping and Tool Company, be dissolved, set aside and held for naught; for the reason that neither said plaintiff nor the said The Cleveland Stamping and Tool Company has any interest either at law or in equity with respect to any action to
75 be taken by defendants, as the Industrial Commission of Ohio, with respect to employers mentioned in said petition other than himself or itself, and for the reason that neither at law nor in equity is said plaintiff or the said The Cleveland Stamping and Tool Company entitled to bring this action on behalf of said employers mentioned in said petition, answer and cross-petition and order, other than himself or itself, respectively.

JOSEPH McGHEE,
Attorney Gen. of Ohio.
FRANK DAVIS, JR.,
Special Counsel.
WM. J. FORD,
Special Counsel.
Attorneys for Defendants.

TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES.

In the Court of Appeals.

1918.

April 24—Two (2) Appeal Bonds filed. 7-131—7-132.
April 24—Transcript of Docket and Journal entries filed. Thirteen (13) original papers filed as follows, to-wit: Petition, Decision, Reply, Notice, Summons, Precipe, Motion, Motion, Motion, Ans. and Cross Pet., Demurrer, Demurrer, 2 Entries.
April 24—Motion filed.
April 25—Notice and proof of service filed.
76 April 25—Restraining order allowed. Bond $500. Ex. as entry. 1-557.
April 25—Two (2) Injunction Bonds filed. 14-57-58.
May 3—Motion filed.
May 3—Demurrer filed.
May 3—Demurrer filed.
May 25—Points for oral argument filed.
May 25—Reply Brief filed.
May 25—Memo. for oral argument filed.

May 25—(1) Brief for Defendants in support of Demurrer and Motion filed.
June 1—Decree as per entry filed. 1-562.

(*Entry Filed April 25, 1918.*)

This day this cause came on to be heard upon the motion of the plaintiff, Frank C. Thornton and the defendant, The Cleveland Stamping and Tool Company, for a temporary restraining order as prayed for in the petition of said Frank C. Thornton and the answer and cross-petition of said The Cleveland Stamping and Tool Company, and the same having been argued by counsel and submitted to the Court, and the Court being fully advised in the premises, does find that said motion is well taken and doth sustain the same.

It is therefore ordered that during the pendency of this suit, or until the further order of the Court, that said defendants, Thomas J. Duffy and Herbert L. Eliot, members of and composing The Industrial Commission of Ohio, their associates and successors in office, are hereby restrained from sending the notices described in the petition and from revoking, changing or modifying the find-
77 ing of facts issued to plaintiff, and the findings of facts issued to all other employers heretofore made and certified by The Industrial Commission of Ohio to plaintiff, Frank C. Thornton, and defendant, The Cleveland Stamping and Tool Company, and all other employers described in said petition who are of sufficient financial ability and credit to render certain the payment of compensation and furnishing the services to employes and their dependents as provided in Section 1465-69, General Code of Ohio, who maintain the bond required by said Commission, who abide by the rules of said Commission and who pay the required amounts into the surplus of the State Insurance Fund as provided in said section; and they are hereby restrained from carrying out and effectuating said resolution of said Commission so adopted December 1, 1917, as described in the petition of said Frank C. Thornton and the answer and cross-petition of said The Cleveland Stamping and Tool Company, and from revoking, changing or modifying any findings of facts heretofore made and certified by said Commission to employers on the sole ground that such employer desires to insure, or has insured the payment of compensation to employes or desires to indemnify, or has now indemnified, himself against loss sustained by the direct payment thereof.

This order shall be effective upon the plaintiff, Frank C. Thornton, and the defendant, The Cleveland Stamping and Tool Company, giving their joint and several bonds herein, in the sum of $500.00.

To whic horder the said defendants, Thomas J. Duffy and Herbert L. Eliot, members of and composing The Industrial Commission of Ohio, at the time excepted and still except.

78 (*Entry Filed June 1, 1918.*)

This day came the parties by their counsel and this cause was heard upon the petition of the Plaintiff, Frank C. Thornton, and the cross-petition of The Cleveland Stamping and Tool Company, and the demurrers of the defendants, Thomas J. Duffy and Herbert L. Eliot, members of and composing The Industrial Commission of Ohio, thereto, and the Court being fully advised in the premises, finds:

That the plaintiff, upon the facts set forth in his petition, was entitled to a temporary restraining order enjoining the defendants as prayed for in his petition, until the 29th day of April, 1918; and upon the facts stated in his petition was not entitled to the relief prayed for, perpetually restraining the defendants, or to any restraining order as prayed for, after the 29th day of April, 1918.

The Court further finds, on the facts stated in the cross-petition of The Cleveland Stamping and Tool Company, that it is not entitled to the relief prayed for in its said cross-petition.

It is therefore ordered and decreed by the Court, that the demurrer of the defendants, Thomas J. Duffy and Herbert L. Eliot, members of and composing The Industrial Commission of Ohio, to the petition of plaintiff be sustained, for the reason that at this time the plaintiff is not entitled to the relief prayed for; and the plaintiff not desiring to plead further, the Court find that plaintiff is not entitled to have the temporary injunction made perpetual and the Court refuses the injunction prayed for in the petition; but as the plaintiff was entitled to the temporary restraining order at the time

79 he filed his petition, it is ordered and decreed that said petition be now dismissed at the cost of defendants, Thomas J. Duffy and Herbert L. Eliot, members of and composing The Industrial Commission of Ohio.

It is further ordered and decreed that the demurrer to the answer and cross-petition of The Cleveland Stamping and Tool Company be sustained and The Cleveland Stamping and Tool Company, not desiring to plead further, the Court find it is not entitled to have the temporary injunction made perpetual and the Court refuses the injunction prayed for in its answer and cross-petition, and said answer and cross-petition is dismissed at the cost of said The Cleveland Stamping and Tool Company.

It is further ordered and decreed that the temporary restraining order, heretofore issued herein, be dissolved.

To the order, decree and judgment of the Court, sustaining said demurrer to the petition of plaintiff, the plaintiff by his counsel excepts.

To which ruling, order, decree and judgment of the Court that the plaintiff was entitled to a temporary restraining order at the time of the filing of his petition, and to the judgment of the Court in assessing the costs upon said petition of plaintiff, against the defendants, the defendants, Thomas J. Duffy and Herbert L. Eliot, members of and composing The Industrial Commission of Ohio, except.

To the order, decree and judgment of the Court, sustaining said demurrer to the cross petition of The Cleveland Stamping and Tool Company, and dismissing its answer and cross-petition, said The Cleveland Stamping and Tool Company, by its counsel, excepts.

To the order, decree and judgment of the Court, dissolving the temporary restraining order heretofore issued, the plaintiff and The Cleveland Stamping and Tool Company severally except.

To the order, decree and judgment of the Court refusing the injunction prayed for in the petition, and refusing to make the temporary injunction perpetual, the plaintiff excepts.

To the order, decree and judgment of the Court refusing the injunction prayed for in said answer and cross-petition, and refusing to make the temporary injunction perpetual, The Cleveland Stamping and Tool Company excepts.

Thereupon, upon the application of plaintiff, it is ordered that the decree of this Court, dissolving the temporary restraining order heretofore issued, be suspended and stayed for ten days from this date, and order that plaintiff and The Cleveland Stamping and Tool Company may apply to the Supreme Court for a temporary injunction, pending proceedings in error in that Court.

(Duly certified.)

Supreme Court of the State of Ohio.

No. 15,999.

FRANK C. THORNTON

vs.

THOMAS J. DUFFY et al.

Transcript of Docket Entries.

Attorneys.	Title of Case.	Action.	Fees and Costs.		Paid by.
Judson Harmon, Cincinnati. Vorys, Sater, Seymour & Pease, Columbus.	Frank C. Thornton, v. Thomas J. Duffy, and Herbert L. Elliott, members of and composing The Industrial Commission of Ohio, and The Cleveland Stamping & Tool Company.	Error to the Court of Appeals of Franklin County.	Petition	$5.00	Vorys, Sater, Seymour & Pease.
			Motion	2.00	Vorys, Sater, Seymour & Pease.
Joseph McGhee, Atty. Gen'l; Frank Davis, Jr., William Ford; John G. Price, Columbus.			Printing Record	$54.00	Vorys, Sater, Seymour & Pease.
			Certified copy of opinion	$3.00	Vorys, Sater, Seymour & Pease.

Judgments, Orders and Decrees.

Date.	Memoranda of Pleadings, etc., Filed. Writs Issued, etc.,
1918.	
June 1st.	Petition in error and waiver of summons filed.
" "	Court of appeals transcript and part of original papers filed.
" "	Cross-petition in error of The Cleveland Stamping & Tool Co., filed.
" "	Motion for temporary restraining order, and waiver, filed.
" 4th.	Original papers filed.
" 6th.	Bond in sum of $1,000.00, signed by plaintiff in error and cross-petitioner in error, by their attorneys, as principal, and by The Aetna Casualty and Surety Company, of Hartford, Conn., by C. A. Pierce, its attorney in fact, filed.
" "	Motion for temporary restraining order allowed. Bond $1,000.00, To Approval of Clerk of this Court. Journal No. 28, page 90.
" 18th.	Papers taken by Spahr & Glenn.
July 10th.	Motion and entry taken by W. E. Benoy to printer.
" 22nd.	Printed record and proof of service filed.
Aug. 10th.	Printed briefs of plaintiff in error and The Cleveland Stamping & Tool Company, filed; proof of service September 6, 1918.
82	
1918.	
Oct. 18th.	Printed brief (12) Industrial Commission filed (Hogan & Okey)
" 19th.	Printed briefs Industrial Commission (McGhee, Ford & Davis) filed.
Dec. 3rd.	Reply brief of Thornton and Stamping Company (12), filed.
	Dec. 4, 1918, proof of service filed.
" 11th.	Defendant's additional citation filed.
" 12th.	Papers returned by Spahr & Glenn.
" 13th.	Printed memorandum for oral argument (7) filed.
Dec. 31st.	Judgment affirmed. Journal No. 28, page 184.
1919.	
Jan. 7th.	
" "	Original papers sent to the Clerk.
Feb. 27th.	Printer's receipted bill for printed record, filed.
March 5th.	Order allowing writ of error to United States Supreme Court, Journal No. 28, page 216.

" 6th, Petition of Frank C. Thornton and The Cleveland Stamping & Tool Company for writ of error, allowed, by Nichols, C. J., filed.
" " Assignment of error filed.
" " Writ of Error filed.
" " Bond in sum of $1,000.00 signed by Frank C. Thornton and The Cleveland Stamping & Tool Company as principals, and by The Aetna Casualty and Surety Company of Hartford, Conn., as surety, approved by Nichols, C. J., filed.
" " Certified copy of opinion filed.
" " Reporter's recorded bill for opinion filed.
" " Citation to defendants and entry of appearance filed.
" " Stipulation as to transcript of record filed.
" " Three copies of writ of error lodged for defendants, and one for clerk.

83 *Transcript of Journal Entries.*

(No. 15969.)

Motion No. 9845.

June 6th, 1918.

FRANK C. THORNTON

v.

THOMAS J. DUFFY et al.

Motion by Plaintiff and the Cleveland Stamping Company for a Temporary Restraining Order in Cause No. 15,969, on the General Docket.

This day this cause came on to be heard upon the motion of the plaintiff in error, Frank C. Thornton, and defendant in error, The Cleveland Stamping and Tool Company, for a temporary restraining order as prayed for in the petition of the said Frank C. Thornton; and the same having been argued by counsel and submitted to the Court, and the Court being fully advised in the premises, does find that said motion is well taken and doth sustain the same.

It is therefore ordered that during the pendency of this suit, or until the further order of the court, that said defendants in error Thomas J. Duffy and Herbert L. Elliott, members of and composing The Industrial Commission of Ohio, their associates and successors in office, are hereby restrained from sending the notices described in the petition, and from revoking, changing or modifying the finding of facts issued to plaintiff in error, and the findings of facts issued to all other employers heretofore made and certified by The Industrial Commission of Ohio to plaintiff in error, Frank C. Thornton, and defendant in error, The Cleveland Stamping and Tool Company, and all other employers described in said petition, who are

of sufficient financial ability and credit to render certain the payment of compensation and furnishing the services to employes and their dependents, as provided in Section 1465-69 General Code of Ohio, who maintain the bond required by said Commission, who abide by the rules of said commission, and who pay the required amounts into the surplus of the State Insurance Fund as provided in said Section; and they are hereby restrained from carrying out and effectuating said resolution of said Commission so adopted December 1, 1917, as described in the petition of said Frank C. Thornton and the answer and cross petition of The Cleveland Stamping and Tool Company, and from revoking, changing or modifying any findings of fact heretofore made and certified by said Commission to employers on the sole ground that such employer desires to insure, or has insured the payment of compensation to employes, or desires to indemnify, or has indemnified himself against loss sustained by the direct payment thereof.

It is ordered that plaintiff in error, Frank C. Thornton, and defendant in error, The Cleveland Stamping and Tool Company give their joint and several bond herein in the sum of one thousand dollars to be approved by the Clerk of this Court, which is accordingly done.

To which said order the said defendants in error, Thomas J. Duffy and Herbert L. Elliott, members of and Composing The Industrial Commission of Ohio, except.

(Journal No. 28, page 90.)

84 December 31st, 1918.

(No. 17999.)

FRANK C. THORNTON

v.

THOMAS J. DUFFY et al.

Error to the Court of Appeals of Franklin County.

This cause came on to be heard upon the transcript of the record of the Court of Appeals of Franklin County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said court of appeals be, and the same is hereby, affirmed; and it appearing to the court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein.

It is further ordered that the defendants in error recover from the plaintiff in error their costs herein expended, taxed at $8—.

Ordered, that a special mandate be sent to the Court of Appeals of Franklin County, to carry this judgment into execution.

(Journal No. 28, page 184.)

85 No. 15989.

FRANK C. THORNTON

v.

THOMAS J. DUFFY AND HERBERT L. ELIOT.

Opinion per Donahue, J.

Filed Mar. 6, 1919. Supreme Court of Ohio, Frank E. McKean, Clerk.

86 FRANK C. THORNTON

v.

THOMAS J. DUFFY AND HERBERT L. ELIOT.

1. The enactment of the Workmen's Compensation Law (103 O. L., 72-92), did not exhaust the authority conferred upon the general assembly of Ohio by Section 35 of Article II of the Constitution. On the contrary, it has the right to amend or repeal all or any portion thereof at any time it deems proper.

2. Contracts of indemnity entered into between an employer of labor and an insurance company since the adoption of Section 35 of Article II of the Constitution are subject to the exercise by the general assembly of the power so conferred upon it to compel all employers of labor to contribute to the state insurance fund, or to impose further conditions or restrictions upon the privilege of electing to pay compensation direct.

3. The act of March 20, 1917 (107 O. L., 157, 159), amending Section 1465-69, General Code, is a valid and constitutional exercise of the authority conferred upon the general assembly of Ohio by Section 35 of Article II of the Constitution of Ohio, and applies to all employers of labor mentioned in Section 1465-68, General Code.

(No. 15989. Decided December 31, 1918.)

Error to the Court of Appeals of Franklin county.

87 The petition of Frank C. Thornton avers that he has in his employ more than forty workmen and operatives, regularly employed in the same business in and about his manufacturing establishment under contracts of hire.

That the defendants, Thomas J. Duffy and Herbert L. Eliot, are the duly appointed and qualified members of the Industrial Commission of Ohio; that there is a vacancy in the Commission, and that the two persons named are the only members of the Commission at the time of the filing of the petition.

That in January, 1914, upon evidence duly submitted, The Industrial Commission of Ohio made its finding of facts, certifying that plaintiff was of sufficient financial ability and credit to render certain

payments in compensation to injured employes and dependents of killed employes, and the furnishing of medical, surgical, nursing and hospital attention, services and medicine and funeral expenses equal to or greater than is provided in the act of the general assembly passed February 26, 1913.

That thereupon he gave bond with security approved by the Commission, and paid the amount required into the state insurance fund, to be credited to the surplus provided for in paragraph 2 of Section 1465-69 of the General Code of Ohio, and thereupon elected to pay individually such compensation and furnish such medical, surgical, nursing and hospital services and attention and funeral ex-
88 penses directly to the injured and dependents of the killed employes of plaintiff, as provided in Section 1465-69, General Code, and has since that time continually abided by the rules of The Industrial Commission of Ohio, maintained required bond and paid the required amount at its maturity credited to such surplus.

That since January, 1914, he has been and is now of sufficient financial ability and credit to render certain the payments of such compensation, and that the Commission has not at any time changed, modified or revoked its finding of fact, and the same is in full force and effect.

That in January, 1914, he made and entered into a written contract with the Aetna Life Insurance Company of Hartford, Conn., wherein the said company agreed to pay to the injured employes of plaintiff, such amount for medical, nursing and hospital services and medicine and such compensation as were and should be provided by Section 1465-41a and Section 1465-106, General Code and amendments thereof, to indemnify this plaintiff against liability for the payment of any of such amounts to injured employes or dependents of killed employes.

That the plaintiff agreed to pay the Aetna Life Insurance Company an estimated premium computed at an agreed rate upon the pay rolls, of wages to be paid by plaintiff to his employes, from April 29, 1914 to April 29, 1915, and a like amount annually thereafter until the contract of insurance should be cancelled in accordance with the terms written therein.

89 That by the terms of said contract, either party thereto might cancel the same on and after thirty days' written notice to the other party of its intention to do so, but that otherwise the contract of insurance should continue in force indefinitely.

The petition also avers further facts in reference to additional premiums or rebates thereon, based upon the actual payroll during the time the contract of insurance should be in force.

That on the 1st day of December, 1917, the defendants, Thomas J. Duffy and Herbert L. Eliot, then composing The Industrial Commission of Ohio, adopted a resolution reciting the act of the general assembly passed February 16, 1917, amending Section 1465-101, General Code, and the act of the general assembly passed March 20, 1917 among other things amending Section 1465-69 General Code, and the act of the General assembly of the state of Ohio passed March 21, 1917, amending Section 9837-2, paragraph 2, General

Code, and declaring that no employer shall be permitted to pay or furnish directly to injured employes or the dependents of killed employes, the compensation and benefits provided in Sections 1465-41a to 1465-101, General Code, if such employer shall by contract or otherwise provide for the insurance of the payment by them of such compensation and benefits, or shall indemnify themselves against loss sustained by the direct payment thereof, and that all authorization or findings of fact theretofore issued by the commission authorizing and permitting such employers to pay or furnish such compensation and benefits direct, shall be and stand revoked
589 of January 10, 1918, as to all employers receiving such authorization who on the date of January 10, 1918, carry any such insurance.

That the Industrial Commission threatened to and will, unless restrained by the order of this court, send such notices and revoke and hold for naught the findings of fact so made and certified to this plaintiff and upon which plaintiff made his election to pay and furnish such compensation direct.

The petition further avers that the contract of plaintiff with the Aetna Life Insurance Company is a valid and subsisting contract. That plaintiff has the right to maintain the same until it shall be cancelled, as provided by its terms, and that the revocation of the finding of facts so certified by the Commission to plaintiffs and the refusal of the Commission to make and certify to plaintiffs its findings of fact as provided in Section 1465-69, will cause plaintiff irreparable injury and damage, for which he has no adequate remedy at law.

The petition further avers that there are more than six hundred and seventy-five employers of labor similarly situated, and many other employers who claim the right to make such contracts of indemnity; that it is impractical to bring them all before the court, and plaintiff sues for the benefit of all such employers.

That the several acts mentioned in the resolution adopted by The Industrial Commission of Ohio on December 1, 1917, have no application to contracts of insurance or indemnity existing when
591 these acts took effect, and were not intended, and do not authorize the employer or the Commission to refuse, revoke or cancel the authorization of employers to pay direct the compensation and benefits provided by law for employes and their dependents, and that if said acts do apply to such contracts, they are in contradiction of Section 1 of Article XIV and Section 10 of Article I of the Constitution of the United States, and Section 28 of Article II of the Constitution of Ohio, and plaintiff prays that The Industrial Commission of Ohio be perpetually enjoined from sending said notices, and from revoking, changing, or modifying such findings of fact made and certified by the Commission to plaintiff, and from carrying out and perpetuating the resolution of December 1, 1917, and from revoking, changing or modifying its findings of fact for and on behalf of any employer who is of sufficient financial ability and credit to render certain the payment of compensation and furnishing the services to employes and their dependents as provided in Section

1465-69, General Code, and who maintain fund required by the Commission and abide by its rulings and pay the required amount into the surplus of the state insurance fund, and for such other and further relief to which he may be entitled.

The answer and cross petition of The Cleveland Stamping & Tool Company avers similar facts, and prays for the same relief.

To the petition of plaintiff and to the answer and cross petition of The Cleveland Stamping & Tool Company, the defendants filed general demurrers, which were sustained by the common
92 pleas court. The cause was appealed to the court of appeals of Franklin county, Ohio, which court held that the plaintiff was entitled to a temporary restraining order enjoining the defendant as prayed for in his petition until the 29th of April, 1918, and upon the facts stated in the petition was not entitled to a perpetual injunction, and sustained the demurrer to the answer and cross petition of The Cleveland Stamping & Tool Company.

This proceeding in error is brought in this court to reverse the judgment of the court of appeals.

Mr. Judson Harmon and Messrs. Vorys, Sater, Seymour & Pease, for plaintiff in error.

Mr. Joseph McGhee, attorney general; Mr. William J. Ford; Mr. Frank Davis, Jr., Mr. Timothy S. Hogan and Mr. George B. Okey, for defendants in error.

93 DONAHUE, J.:

Section 35 of Article II of the Constitution of Ohio, as adopted September 3, 1912, authorizes the general assembly of Ohio to pass laws establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, for the purpose of providing compensation to workmen and their dependents, for death, injury, or occupational disease occasioned in the course of such workmen's employment.

In pursuance of this authority, the general assembly enacted a Workmen's Compensation Law (103 O. L., 72-92.) Section 22 of this act (Section 1465-69 General Code) provided, among other things, that certain employers under certain conditions, might elect to pay individually, or from a benefit fund, department or association, compensation to workmen and their dependents for death, or injuries received in the course of their employment.

Under the provisions of Section 35 of Article II, Constitution, the general assembly was not required to make any such exception in favor of any employer, but could have required every employer mentioned in sub-division 2 of Section 13 of that act, to pay into the state insurance fund, the amount of premium determined and fixed by the State Liability Board of Awards; and if it could have done this, then undoubtedly it can at any time amend Section 22 of that act by striking out such exceptions in favor of employers of
94 sufficient financial ability to render certain the payment of compensation to injured employes or to the dependents of killed employes, and the furnishing of medical, surgical, nursing

and hospital attention and services, medicines and funeral expenses equal to or greater than provided in the original act.

It necessarily follows that if the general assembly has the power at any time to withdraw from these employers this privilege to elect to pay such compensation and furnish such services and attention and funeral expenses directly, it can from time to time impose such conditions as in its judgment seems wise and necessary to safeguard the main purpose and intent, not only of the act itself, but of the constitutional provision under authority of which this law was passed.

It also follows that whoever seeks to avail himself of the benefits of this exception in his favor, must comply with the conditions imposed. Verducci v. Casualty Company of America, 96 Ohio St., 260.

While the contract of insurance described in the petition does not provide for any definite term, nevertheless, at the time it was made, it must have been within the contemplation of the parties thereto that they could not by contract limit the power of the general assembly conferred upon it by Section 35, Article II of the Constitution, to withdraw this privilege or to limit it by other and further conditions that would render such contract of indemnity wholly useless to the employer.

The question is in every way analogous to the question arising in the case of Louisville & Nashville Ry. Co. v. Mottley, 219 U. S., 467, in which case it was held by the supreme court of the United
95 States, that— "The power of congress to act in regard to matters delegated to it is not hampered by contracts made in regard to such matters by individuals, but contracts of that nature are made subject to the possibility that, even if valid when made, congress may exercise its power to render them invalid." To the same effect is the decision of the supreme court of Vermont in the case of Fitzgerald v. Grand Trunk Ry. Co., 63 Vt., 169. See also Boyd v. Alabama, 94 U. S., 645; Beer Co. v. Massachusetts, 97 U. S., 25; Stone v. Mississippi, 101 U. S., 814; Butchers' Union Co. v. Crescent City Co., 111 U. S., 746, and Railroad Company v. Nebraska, 107 U. S., 58.

But the question in this case does not depend merely upon the general authority of the legislature to exercise police powers, but rather directly upon the constitutional grant of power and the further consideration that the privilege granted to certain employers by Section 22 of the Workmen's Compensation Act, to pay compensation direct, is an exception to the general provisions of that act in his favor.

There is therefore no reasonable hypothesis upon which to base the theory that a private contract to continue for an indefinite number of years, could in any way prevent the legislature from withdrawing this privilege or adding other and further conditions.

There is, however, a further provision in Section 22 of the original act, that seems to have been overlooked in the argument of this case. That provision reads as follows: "The Industrial Commission of
Ohio may at any time change or modify its findings of fact
96 herein provided for, if in its judgment such action is necessary or desirable to secure or assure a strict compliance with

all of the provisions of the law in reference to the payment of compensation and the furnishing of medical, nurse and hospital services and medicines and funeral expenses to injured and dependents of killed employes."

The experience of four or more years under this Workmen's Compensation Law may have demonstrated to the entire satisfaction of this commission that it is necessary or desirable to change or modify its former findings of fact in order to secure or assure a strict compliance with the law, where employers have elected to pay this compensation direct, and have later entered into a contract with an indemnity company, by the terms of which, as averred in this petition, "The insurance company * * * agrees to pay to the injured employes of plaintiff, such amounts for medical, nurse and hospital services and medicine and such compensation as has and should be provided by said act of the general assembly comprised in Section 1465-41*a* to Section 1465-106, General Code of Ohio, and amendments thereto, and in the event of death of any of plaintiff's employes, such amounts as were or should be provided in said acts and amendments thereof for funeral expenses and for compensation to the dependents or those partially dependent upon such employes."

While Section 54 of the Workmen's Compensation Law, (Section 1465-101, General Code), as it read prior to the amendment
97 of February 16, 1917, undoubtedly permitted the writing of such a contract, nevertheless, that section must be construed in connection with Section 22 of the same act, which authorizes The Industrial Commission to change or modify its findings of fact provided for in that section, whenever in its judgment such action is necessary or desirable to secure or assure a strict compliance with all the provisions of that act.

It therefore follows, that if The Industrial Commission should find that such contracts furnish an opportunity for unfair or fraudulent settlement, and had resulted or might result not only in avoiding a strict compliance with the provisions of the act, but also in some instances defeat its intent and purpose, especially where the injured employe or the dependents of an employe killed in the course of his employment are not fully advised of their rights under Section 27 of this act and rule 18 adopted by The Industrial Commission under authority of the act creating that Commission, it would have the power under this provision of Section 22 to change or modify its former findings of fact in reference to employers who had elected to pay individually from a benefit fund, department, or association such compensation direct.

But the right of The Industrial Commission of Ohio to change or modify its former findings of fact does not now depend upon this construction of this paragraph of Section 22. The amendment
of March 20, 1917, of Section 1465-69, General Code, specif-
98 ically limits the privilege of electing to pay compensation individually or from a benefit fund, department or association, to those employers "who do not desire to insure the payment thereof or indemnify themselves against loss sustained by direct payment there of," and therefore it becomes the duty of The Indus-

trial Commission of Ohio to change or modify its former findings of fact in reference to such employers, and make the same conform to the provisions of the amended section.

This added condition precedent to the exemption of certain employers from the general provisions of the act, is not only clearly within the power of the general assembly, but it is in furtherance of the purpose and intent of the constitution and the law, to create and maintain one insurance fund, to be administered by the state, out of which fund compensation shall be paid to workmen and their dependents for death, injuries, or occupational diseases occasioned in the course of employment.

If insurance is desired, the state will furnish it out of the fund created and maintained for that purpose, for it would not only be arbitrary, unfair, and without purpose, to permit some employers of labor to enter into contracts of insurance with private companies, and compel all other employers to contribute to the state insurance fund, but it would also hinder, and perhaps utterly demoralize the method and defeat the object and purpose of the creation of such a fund.

99 This is an action to enjoin The Industrial Commission of Ohio from revoking, changing or modifying its findings of fact heretofore made by it in reference to the right of this plaintiff and the cross-petitioner to elect to pay compensation direct. Therefore, the question of the constitutionality of Section 1465-101, General Code, as amended February 15, 1917, or the constitutionality of paragraph 2 of Section 9607-2, General Code, as amended March 21, 1917, is in no wise important in the disposition of this case. If Section 1465-69, General Code, as amended March 20, 1917, is a valid and constitutional act of the general assembly of Ohio, and applies to all employers of labor mentioned in subdivision 2 of Section 13 of the Workmen's Compensation Act, then The Industrial Commission not only has authority, but it becomes its duty to require all employers of labor to bring themselves within the terms and conditions before permitting them to exercise the privilege of election, regardless of the constitutionality of the acts above mentioned.

Judgment affirmed.

Nichols, C. J., Wanamaker, Newman, Jones, Matthias and Johnson, J. J., concur.

100 Supreme Court of the State of Ohio, of the Term of January, A. D. 1919.

STATE OF OHIO,
City of Columbus:

I, E. O. Randall, Reporter of the Supreme Court of Ohio, do hereby certify that the foregoing transcript, consisting of fourteen (14) pages, constitutes a full, true and correct copy of the original opinion of the Supreme Court of Ohio in the case of Frank C. Thorn-

ton v. Thomas J. Duffy and Herbert L. Eliot, as the same appears on file and of record in this office, as of the date of this certificate.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this twenty-seventh day of February, A. D., 1919.

E. O. RANDALL,
Reporter.

[Endorsed:] Filed Mar. 6, 1919. Supreme Court of Ohio, Frank E. McKean, Clerk.

101 In the Supreme Court of Ohio.

No. 15999.

FRANK C. THORNTON, Plaintiff in Error,

vs.

THOMAS J. DUFFY and HERBERT L. ELIOT, Members of and Composing The Industrial Commission of Ohio, Defendants in Error.

Certificate of Lodgment.

SUPREME COURT, STATE OF OHIO, *ss:*

I, Frank E. McKean, Clerk of said Court, do hereby certify that there was lodged with me, as said Clerk, on the 6th day of March, 1919, in the above entitled cause the following:

1. The original bond, a copy of which is herein set forth.

2. Three copies of the writ of error, as herein set forth, one for each of the within named defendants in error, Thomas J. Duffy and Herbert L. Eliot, members of and composing the Industrial Commission of Ohio, and one to file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office in Columbus, Ohio, this 7th day of March, 1919.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of Supreme Court of Ohio.

102 [Endorsed:] No. 15999. In the Supreme Court of Ohio Frank C. Thornton, Plaintiff in Error, vs. Thomas J. Duffy and Herbert L. Eliot, members of and composing the Industrial Commission of Ohio, Defendants in Error. Certificate of Lodgment.

103 In the Supreme Court of Ohio.

No. 15999.

FRANK C. THORNTON, Plaintiff in Error,

vs.

THOMAS J. DUFFY and HERBERT L. ELIOT, Members of and Composing The Industrial Commission of Ohio, Defendants in Error.

Authentication of Record.

STATE OF OHIO,
County of Franklin, City of Columbus, ss:

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing petition for writ of error, assignments of errors, order allowing writ of error, writ of error, citation to defendants in error, Thomas J. Duffy and Herbert L. Eliot, members of and composing the Industrial Commission of Ohio, and their entry of appearance, stipulation as to transcript of record, are the original papers filed in this court in the above entitled cause; that the copy of the bond attached hereto is a true copy of the bond filed in said cause; that the printed copy of the record attached hereto is a true copy of the record filed in said cause; that the foregoing transcript of docket and journal entries is truly taken and correctly copied from the records of said court;

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of said the Supreme Court of Ohio, this 7th day of March, 1919.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.

104 [Endorsed:] No. 15999. In the Supreme Court of Ohio. Frank C. Thornton, Plaintiff in Error, vs. Thomas J. Duffy and Herbert L. Eliot, members of and composing The Industrial Commission of Ohio, Defendants in Error. Authentication of Record. —— ——, Clerk of the Supreme Court of Ohio.

Endorsed on cover: File No. 27006. Ohio Supreme Court. Term No. 920. Frank C. Thornton and The Cleveland Stamping and Tool Company, plaintiffs in error, vs. Thomas J. Duffy and Herbert L. Eliot, members of and composing The Industrial Commission of Ohio. Filed March 17th, 1919. File No. 27006.

Supreme Court of the United States

No. 920.

FRANK C. THORNTON AND THE CLEVELAND STAMPING AND TOOL COMPANY,

Plaintiffs in Error,

vs.

THOMAS J. DUFFY AND HERBERT L. ELIOT, MEMBERS OF AND COMPOSING THE INDUSTRIAL COMMISSION OF OHIO,

Defendants in Error.

MOTION TO ADVANCE.

Comes now the attorney general of the State of Ohio, as counsel for the defendants in error, members of and composing the Industrial Commission of Ohio, and moves the court to advance the above entitled cause for hearing on a date convenient to the court.

The cause is before this court on a writ of error to the Supreme Court of Ohio.

In the original action, the plaintiffs in error sought to enjoin the defendants in error, as members of the Industrial Commission of Ohio, from proceeding to act under, and from carrying into effect and operation, two amendments to the Workmen's Compensation Law, passed by the General Assembly of the state in 1917.

In the year 1912, an amendment to the Ohio constitution was adopted whereby laws were authorized to be

passed establishing a state fund to be created by compulsory contributions thereto by employers, for the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational diseases, occasioned in the course of such workmen's employment. In the following year, 1913, the General Assembly enacted the Workmen's Compensation Law. It provided (Section 1465-69; 103 Ohio L., 89) that every employer having in service five or more workmen should annually pay into the state insurance fund the amount of premium fixed by the board charged with the administration of the law. The section, however, contained a provision to the effect that

> "employers who [ ] may be of sufficient financial ability or credit to render certain the payment of compensation to injured employes or to the dependents of killed employes" might, upon a finding of facts by the board and the giving of such security or bond as the board might require, elect to pay compensation directly.

Following this enactment the plaintiffs and many other employers, electing to pay compensation directly instead of contributing to the state fund, entered into contracts of indemnity with various liability insurance companies to protect them against their liability, which contracts were indeterminable, except that either party might, upon thirty days' written notice, effect cancellation of the same.

In 1917, the Workmen's Compensation Law was amended in two respects. Section 1465-69 (107 Ohio L., 159) was so amended as that, in addition to the facts and requirements of the original section necessary to enable the employer to pay compensation directly, it contained the further proviso that such employers

> "who do not desire to insure the payment thereof or indemnify themselves against loss sustained by the direct payment thereof, may upon a finding of such

> fact by the Industrial Commission of Ohio, elect to pay individually such compensation * * * directly to such injured or the dependents of such killed employes."

The other amendment was to Section 1465-101 (107 Ohio L., 7), which, as amended, provides that

> "All contracts and agreements shall be absolutely void and of no effect which undertake to indemnify or insure an employer against loss or liability for the payment of compensation to workmen or their dependents for death, injury or occupational disease * * *, or which provide that the insurer shall pay such compensation, or which indemnify the employer against damages * * *. No license or authority to enter into any such agreement or issue any such policies of insurance shall be granted or issued by any public authority."

The questions in the case are whether these amendments apply to the existing insurance contracts in question and whether the parties to the insurance contracts could limit the power of the General Assembly, conferred upon it by Section 35 of Article II of the Ohio Constitution, to withdraw the license or privilege extended to employers to pay the workmen's compensation directly or to limit it by other and further conditions.

All of the Ohio courts held to the contrary of the proposition. The case is of special importance to a very large number of employes of the State of Ohio, and to the entire people of the state who are interested in the enforcement of laws the constitutionality of which has been upheld by all of the courts of the state.

Almost three years have elapsed since the enactments were passed, and their enforcement by an important department of the government of the State of Ohio has been prevented by this suit, the appellate courts, including this court, having granted restraining orders pending the suit.

A copy of the opinion in the case, by Judge Donahue, in the Supreme Court of Ohio, all members of the court concurring, is attached, as an appendix.

On behalf of the defendants in error, the attorney general of Ohio urges that such special and peculiar circumstances exist in connection with the cause as to justify the court in advancing and taking the same up out of its regular order on the docket.

Respectfully submitted,

JOHN G. PRICE,

Attorney General of Ohio;

B. W. GEARHEART,

Special Counsel;

Attorneys for Defendants in Error.

APPENDIX.

Frank S. Thornton v. Thomas J. Duffy and Herbert L. Eliot.

1. The enactment of the Workmen's Compensation Law (103 O. L., 72-92), did not exhaust the authority conferred upon the general assembly of Ohio by Section 35 of Article II of the Constitution. On the contrary, it has the right to amend or repeal all or any portion thereof at any time it deems proper.

2. Contracts of indemnity entered into between an employer of labor and an insurance company since the adoption of Section 35 of Article II of the Constitution are subject to the exercise by the general assembly of the power so conferred upon it to compel all employers of labor to contribute to the state insurance fund, or to impose further conditions or restrictions upon the privilege of electing to pay compensation direct.

3. The act of March 20, 1917 (107 O. L., 157, 159), amending Section 1465-69, General Code, is a valid and constitutional exercise of the authority conferred upon the General Assembly of Ohio by Section 35 of Article II of the Constitution of Ohio, and applies to all employers of labor mentioned in Section 1465-60, General Code.

(No. 15889—Decided December 31, 1918.)

Error to the Court of Appeals of Franklin County.

The petition of Frank C. Thornton avers that he has in his employ more than forty workmen and operatives, regularly employed in the same business in and about his manufacturing establishment under contracts of hire.

That the defendants, Thomas J. Duffy and Herbert L. Eliot, are the duly appointed and qualified members of the Industrial Commission of Ohio; that there is a vacancy in the Commission, and that the two persons named are the only members of the Commission at the time of the filing of the petition.

That in January, 1914, upon evidence duly submitted, the Industrial Commission of Ohio made its finding of facts, certifying that plaintiff was of sufficient financial ability and credit to render certain payments in compensation to injured employes and dependents of killed employes, and the furnishing of medical, surgical, nursing and hospital attention, services and medicine and funeral expenses equal to or greater than is provided in the act of the general assembly passed February 26, 1913.

That thereupon he gave bond with security approved by the Commission, and paid the amount required into the state insurance fund, to be credited to the surplus provided for in paragraph 2 of Section 1465-69 of the General Code of Ohio, and thereupon elected to pay individually such compensation and furnish such medical, surgical, nursing and hospital services and attention and funeral expenses directly to the injured and dependents of the killed employes of plaintiff, as provided in Section 1465-69, General Code, and has since that time continually abided by the rules of the Industrial Commission of Ohio, maintained required bond and paid the required amount at its maturity credited to such surplus.

That since January, 1914, he has been and is now of sufficient financial ability and credit to render certain the payments of such compensation, and that the Commission has not at any time changed, modified or revoked its finding of fact, and the same is in full force and effect.

That in January, 1914, he made and entered into a written contract with the Aetna Life Insurance Company of Hartford, Connecticut, wherein the said company agreed to pay to the injured employes of plaintiff, such amount for medical, nursing and hospital services and medicine and such compensation as were and should be provided by Section 1465-41a and Section 1465-106, General Code and amendments thereof, to indemnify this

plaintiff against liability for the payment of any of such amounts to injured employes or dependents of killed employes.

That the plaintiff agreed to pay the Aetna Life Insurance Company an estimated premium computed at an agreed rate upon the payrolls, of wages to be paid by plaintiff to his employes, from April 29, 1914, to April 29, 1915, and a like amount annually thereafter until the contract of insurance should be cancelled in accordance with the terms written therein.

That by the terms of said contract, either party thereto might cancel the same on and after thirty days' written notice to the other party of its intention to do so, but that otherwise the contract of insurance should continue in force indefinitely.

The petition also avers further facts in reference to additional premiums or rebates thereon, based upon the actual payment during the time the contract of insurance should be in force.

That on the first day of December, 1917, the defendants, Thomas J. Duffy and Herbert L. Eliot, then composing the Industrial Commission of Ohio, adopted a resolution reciting the act of the general assembly passed February 16, 1917, amending Section 1465-101, General Code, and the act of the General Assembly passed March 20, 1917, among other things amending Section 1465-69, General Code, and the act of the General Assembly of the State of Ohio passed March 21, 1917, amending Section 9607-2, paragraph 2, General Code, and declaring that no employer shall be permitted to pay or furnish directly to injured employes or the dependents of killed employes, the compensation and benefits provided in Sections 1465-41a to 1465-106, General Code, if such employer shall by contract or otherwise provide for the insurance of the payment by them of such compensation and benefits, or

shall indemnify themselves against loss sustained by the direct payment thereof, and that all authorization or findings of fact theretofore issued by the Commission authorizing and permitting such employers to pay or furnish such compensation and benefits direct, shall be and stand revoked of January 10, 1918, as to all employers receiving such authorization who on the date of January 10, 1918, carry any such insurance.

That the Industrial Commission threatened to and will, unless restrained by the order of this court, send such notices and revoke and hold for naught the findings of fact so made and certified to this plaintiff and upon which plaintiff made his election to pay and furnish such compensation direct.

The petition further avers that the contract of plaintiff with the Aetna Life Insurance Company is a valid and subsisting contract. That plaintiff has the right to maintain the same until it shall be cancelled, as provided by its terms, and that the revocation of the finding of facts so certified by the Commission to plaintiffs and the refusal of the Commission to make and certify to plaintiffs its findings of fact as provided in Section 1465-69, will cause plaintiff irreparable injury and damage, for which he has no adequate remedy at law.

The petition further avers that there are more than six hundred and seventy-five employers of labor similarly situated, and many other employers who claim the right to make such contracts of indemnity; that it is impractical to bring them all before the court, and plaintiff sues for the benefit of all such employers.

That the several acts mentioned in the resolution adopted by the Industrial Commission of Ohio on December 1, 1917, have no application to contracts of insurance or indemnity existing when these acts took effect, and were not intended, and do not authorize the employer

or the Commission to refuse, revoke or cancel the authorization of employers to pay direct the compensation and benefits provided by law for employes and their dependents, and that if said acts do apply to such contracts, they are in contradiction of Section 1 of Article XIV and Section 10 of Article I of the Constitution of the United States, and Section 28 of Article II of the Constitution of Ohio, and plaintiff prays that the Industrial Commission of Ohio be perpetually enjoined from sending said notices, and from revoking, changing, or modifying such findings of fact made and certified by the Commission to plaintiff, and from carrying out and perpetuating the resolution of December 1, 1917, and from revoking, changing or modifying its findings of fact for and on behalf of any employer who is of sufficient financial ability and credit to render certain the payment of compensation and furnishing the services to employes and their dependents as provided in Section 1465-69, General Code, and who maintain bond required by the Commission and abide by its rulings and pay the required amount into the surplus of the state insurance fund, and for such other and further relief to which he may be entitled.

The answer and cross-petition of The Cleveland Stamping & Tool Company avers similar facts, and prays for the same relief.

To the petition of plaintiff and to the answer and cross-petition of The Cleveland Stamping & Tool Company, the defendants filed general demurrers, which were sustained by the Common Pleas Court. The cause was appealed to the Court of Appeals of Franklin county, Ohio, which court held that the plaintiff was entitled to a temporary restraining order enjoining the defendants as prayed for in his petition until the twenty-ninth day of April, 1918, and upon the facts stated in the petition was not entitled to a perpetual injunction, and sustained the demurrer to

the answer and cross-petition of The Cleveland Stamping & Tool Company.

This proceeding in error is brought in this court to reverse the judgment of the Court of Appeals.

Mr. Judson Harmon and Messrs. Vorys, Sater, Seymour & Pease for plaintiff in error.

Mr. Joseph McGhee, attorney general; Mr. William J. Ford, Mr. Frank Davis, Jr., Mr. Timothy S. Hogan and Mr. George B. Okey, for defendants in error.

Donahue, J.:

Section 35 of Article II of the Constitution of Ohio, as adopted September 3, 1912, authorizes the General Assembly of Ohio to pass laws establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, for the purpose of providing compensation to workmen and their dependents, for death, injury, or occupational diseases occasioned in the course of such workmen's employment.

In pursuance of this authority, the General Assembly enacted a Workmen's Compensation Law (103 O. L., 72-92). Section 22 of this act (Section 1465-69, General Code), provided among other things, that certain employers under certain conditions, might elect to pay individually, or from a benefit fund, department or association, compensation to workmen and their dependents for death, or injuries received in the course of their employment.

Under the provisions of Section 35 of Article II, Constitution, the General Assembly was not required to make any such exception in favor of any employer, but could have required every employer mentioned in sub-division 2 of Section 13 of that act, to pay into the state insurance fund, the amount of premium determined and fixed by the State Liability Board of Awards; and if it could have done this, then undoubtedly it can at any time amend Sec-

tion 22 of that act by striking out such exceptions in favor of employers of sufficient financial ability to render certain the payment of compensation to injured employes or to the dependents of killed employes, and the furnishing of medical, surgical, nursing and hospital attention and services, medicines and funeral expenses equal to or greater than provided in the original act.

It necessarily follows that if the General Assembly has the power at any time to withdraw from these employers this privilege to elect to pay such compensation and furnish such services and attention and funeral expenses directly, it can from time to time impose such conditions as in its judgment seems wise and necessary to safeguard the main purpose and intent, not only of the act itself, but of the constitutional provision under authority of which this law was passed.

It also follows that whoever seeks to avail himself of the benefits of this exception in his favor, must comply with the conditions imposed. Verducci v. Casualty Company of America, 96 Ohio St., 260.

While the contract of insurance described in the petition does not provide for any definite term, nevertheless, at the time it was made, it must have been within the contemplation of the parties thereto that they could not by contract limit the power of the general assembly conferred upon it by Section 35, Article II of the Constitution, to withdraw this privilege or to limit it by other and further conditions that would render such contract of indemnity wholly useless to the employer.

The question is in every way analogous to the question arising in the case of Louisville & Nashville Ry. Co. v. Hottley, 219 U. S., 467, in which case it was held by the Supreme Court of the United States that, "The power of Congress to act in regard to matters delegated to it is not hampered by contracts made in regard to such matters

by individuals, but contracts of that nature are made subject to the possibility that, even if valid when made, Congress may exercise its power to render them invalid." To the same effect is the decision of the Supreme Court of Vermont in the case of Fitzgerald v. Grand Trunk Ry. Co., 63 Vt., 169. See also Boyd v. Alabama, 94 U. S., 645; Beer Co. v. Massachusetts, 97 U. S., 25; Stone v. Mississippi, 101 U. S., 814; Butchers' Union Co. v. Crescent City Co., 111 U. S., 746, and Railroad Company v. Nebraska, 107 U. S., 58.

But the question in this case does not depend merely upon the general authority of the legislature to exercise police powers, but rather directly upon the constitutional grant of power and the further consideration that the privilege granted to certain employers by Section 22 of the Workmen's Compensation Act, to pay compensation direct, is an exception to the general provisions of that act in his favor.

There is therefore no reasonable hypothesis upon which to base the theory that a private contract to continue for an indefinite number of years, could in any way prevent the legislature from withdrawing this privilege or adding other and further conditions.

There is, however, a further provision in Section 22 of the original act, that seems to have been overlooked in the argument of this case. That provision reads as follows: "The Industrial Commission of Ohio may at any time change or modify its findings of fact herein provided for, if in its judgment such action is necessary or desirable to secure or assure a strict compliance with all of the provisions of the law in reference to the payment of compensation and the furnishing of medical, nurse and hospital services and medicines and funeral expenses to injured and dependents of killed employes."

The experience of four or more years under this Workmen's Compensation Law may have demonstrated to the entire satisfaction of this commission that it is necessary or desirable to change or modify its former findings of fact in order to secure or assure a strict compliance with the law, where employers have elected to pay this compensation direct, and have later entered into a contract with an indemnity company, by the terms of which, as averred in this petition, "The insurance company * * * agrees to pay to the injured employes of plaintiff, such amounts for medical, nurse and hospital services and medicine and such compensation as has and should be provided by said act of the General Assembly comprised in Section 1465-41a to Section 1465-106, General Code of Ohio, and amendments thereto, and in the event of death of any of plaintiff's employes, such amounts as were or should be provided in said acts and amendments thereof for funeral expenses and for compensation to the dependents of those partially dependent upon such employes."

While Section 54 of the Workmen's Compensation Law, (Section 1465-101, General Code), as it read prior to the amendment of February 16, 1917, undoubtedly permitted the writing of such a contract, nevertheless, that section must be construed in connection with Section 22 of the same act, which authorizes the Industrial Commission to change or modify its findings of fact provided for in that section, whenever in its judgment such action is necessary or desirable to secure or assure a strict compliance with all the provisions of that act.

It therefore follows, that if the Industrial Commission should find that such contracts furnish an opportunity for unfair or fraudulent settlement, and had resulted or might result not only in avoiding a strict compliance with the provisions of the act, but also in some instances defeat its intent and purpose, especially where

the injured employe or the dependents of an employe killed in the course of his employment are not fully advised of their rights under Section 27 of this act and Rule 18 adopted by the Industrial Commission under authority of the act creating that Commission, it would have the power under this provision of Section 22 to change or modify its former findings of fact in reference to employers who had elected to pay individually from a benefit fund, department, or association such compensation direct.

But the right of the Industrial Commission of Ohio to change or modify its former findings of fact, does not now depend upon this construction of this paragraph of Section 22. The amendment of March 20, 1917, of Section 1465-69, General Code, specifically limits the privilege of electing to pay compensation individually or from a benefit fund, department or association, to those employers "who do not desire to insure the payment thereof or indemnify themselves against loss sustained by direct payment thereof," and therefore it becomes the duty of the Industrial Commission of Ohio to change or modify its former finding of fact in reference to such employers, and make the same conform to the provisions of the amended section.

This added condition precedent to the exemption of certain employers from the general provisions of the act, is not only clearly within the power of the General Assembly, but it is in furtherance of the purpose and intent of the constitution and the law, to create and maintain one insurance fund, to be administered by the state, out of which fund compensation shall be paid to workmen and their dependents for death, injuries, or occupational diseases occasioned in the course of employment.

If insurance is desired, the state will furnish it out of the fund created and maintained for that purpose, for it

would not only be arbitrary, unfair, and without purpose, to permit some employers of labor to enter into contracts of insurance with private companies, and compel all other employers to contribute to the state insurance fund, but it would also hinder, and perhaps utterly demoralize the method and defeat the object and purpose of the creation of such a fund.

This is an action to enjoin the Industrial Commission of Ohio from revoking, changing or modifying its findings of fact heretofore made by it in reference to the right of this plaintiff and the cross-petitioner to elect to pay compensation direct. Therefore, the question of the constitutionality of Section 1465-101, General Code, as amended February 16, 1917, or the constitutionality of paragraph 2 of Section 9507-2, General Code, as amended March 21, 1917, is in no wise important in the disposition of this case. If Section 1465-69, General Code, as amended March 20, 1917, is a valid and constitutional act of the General Assembly of Ohio, and applies to all employers of labor mentioned in subdivision 2 of Section 13 of the Workmen's Compensation Act, then the Industrial Commission not only has authority, but it becomes its duty to require all employers of labor to bring themselves within the terms and conditions before permitting them to exercise the privilege of election, regardless of the constitutionality of the acts above mentioned.

Judgment affirmed.

Nichols, C. J., Wanamaker, Newman, Jones, Matthias and Johnson, JJ., concur.

JAMES D. BAKER, CLERK.

Supreme Court of the United States

OCTOBER TERM 1918.

No. 322

FRANK C. THORNTON,

Plaintiff in Error,

vs.

THOMAS J. DUFFY AND HERBERT L. ELIOT, MEMBERS OF AND COMPOSING THE INDUSTRIAL COMMISSION OF OHIO, AND THE CLEVELAND STAMPING AND TOOL COMPANY,

Defendants in Error.

APPLICATION FOR INTERLOCUTORY INJUNCTION.

Judson Harmon and
A. I. Vorys,
Attorneys for Frank C. Thornton and The Cleveland Stamping & Tool Company.

FOOTMAKER & ROOSEVELS, Law Printers, Columbus, Ohio

Supreme Court of the United States

OCTOBER TERM 1918.

No. 920.

FRANK C. THORNTON,

Plaintiff in Error,

vs.

THOMAS J. DUFFY AND HERBERT L. ELIOT, MEMBERS OF AND COMPOSING THE INDUSTRIAL COMMISSION OF OHIO, AND THE CLEVELAND STAMPING AND TOOL COMPANY,

Defendants in Error.

APPLICATION FOR INTERLOCUTORY INJUNCTION.

Frank C. Thornton and The Cleveland Stamping and Tool Company make this their joint application for an interlocutory injunction enjoining during the pendency of this action, Thomas J. Duffy and Herbert L. Eliot, members of and composing the Industrial Commission of Ohio, their associates and successors in office, from sending notices to said Frank C. Thornton and The Cleveland Stamping and Tool Company and the other employers in Ohio on whose behalf this action was brought, re-

quiring them as a condition to their right to pay or furnish the compensation and benefits provided in Sections 1465-41a to 1465-106, General Code of Ohio, directly to their employes and their dependents, to state in writing that they do not desire to insure such payments or indemnify themselves against loss sustained by such payments; and from revoking, changing or modifying the findings of facts issued to said Frank C. Thornton and The Cleveland Stamping and Tool Company and said other employers, heretofore made and certified by The Industrial Commission of Ohio, who are of sufficient financial ability and credit to render certain the payment of compensation and furnishing the services to employes and their dependents as provided in Section 1465-69, General Code of Ohio, who maintain the bond required by said Commission, who abide by the rules of said Commission, and who pay the required amounts into the surplus of the state insurance fund as provided in said section; and from revoking, changing or modifying any of said findings of facts heretofore made to any such employers on the sole ground that the employer desires to insure, or has insured the payment of compensation to employes, or desires to indemnify, or has now indemnified himself against loss sustained by the direct payment thereof.

Frank C. Thornton,
The Cleveland Stamping & Tool Co.,
By Judson Harmon,
A. I. Vorys,
Their Attorneys.

NOTICE.

To the Honorable James M. Cox, Governor of Ohio:

You are hereby notified that on the 20th day of March, 1919, Frank C. Thornton and The Cleveland Stamping and Tool Company, will apply to the Supreme Court of the United States for an interlocutory injunction, as is more fully set forth in an application for interlocutory injunction, copy of which is hereto attached.

Judson Harmon and
Vorys, Sater, Seymour & Pease,
Attorneys for Frank C. Thornton and The Cleveland Stamping and Tool Company.

Columbus, Ohio, March 13, 1919.

Copy of the foregoing notice, together with a copy of application for interlocutory injunction received at Columbus, Ohio, this thirteenth day of March, 1919.

James M. Cox,
Governor of Ohio.

CONSENT

Consent is hereby given to an interlocutory injunction as prayed for in the foregoing application.

John G. Price,
Attorney General of Ohio, Attorney for Thomas J. Duffy, and Herbert L. Eliot, Members of and Composing the Industrial Commission of Ohio.

March 13, 1919.

LETTER

State of Ohio,
Office of the Attorney General,
Columbus.

John G. Price, Attorney General.

March 13, 1919.

Messrs. Vorys, Sater, Seymour & Pease, Attorneys at Law, 52 East Gay Street, Columbus, Ohio.

Frank C. Thornton vs. Thos. J. Duffy et al.

Gentlemen: Herewith I am handing you consent to interlocutory injunction in the Supreme Court of the United States and approved entry.

In accordance with my former suggestion, I have fixed the penalty of the bond at $1000.00, which I understand meets your approval. You may, of course, advise the court that we have agreed upon that sum.

Very respectfully,

(Signed) John G. Price,
Attorney General.

Enc.

FORM OF PROPOSED ENTRY.

This day this cause came on to be heard upon the application of Frank C. Thornton and The Cleveland Stamping and Tool Company for an interlocutory injunction, and the written consent of the defendants, Thomas J. Duffy and Herbert L. Eliot, members of and composing the Industrial Commission of Ohio, consenting to the granting of an interlocutory injunction as prayed for in said application, having been filed herein, and said application having been submitted to and heard by the

court, the court does find that said application is well taken and does grant the same.

It is therefore ordered that, during the pendency of this action, or until the further order of this court, the said defendants, Thomas J. Duffy and Herbert L. Eliot, members of and composing the Industrial Commission of Ohio, their associates and successors in office, be, and they hereby are, enjoined from sending notices to said Frank C. Thornton and The Cleveland Stamping and Tool Company and the other employers in Ohio on whose behalf this action was brought, requiring them as a condition to their right to pay and furnish the compensation and benefits provided in Sections 1465-41a to 1465-106, General Code of Ohio, directly to their employes and their dependents, to state in writing that they do not desire to insure such payments or indemnify themselves against loss sustained by such payments; and are hereby enjoined from revoking, changing or modifying the findings of facts issued to said Frank C. Thornton and The Cleveland Stamping and Tool Company and said other employers, heretofore made and certified by the Industrial Commission of Ohio, who are of sufficient financial ability and credit to render certain the payment of compensation and furnishing the services to employes and their dependents as provided in Section 1465-69, General Code of Ohio, who maintain the bond required by said Commission, who abide by the rules of said Commission, and who pay the required amounts into the surplus of the state insurance fund as provided in said section; and said defendants are hereby enjoined from revoking, changing or modifying any of said findings of facts heretofore made to any such employers upon the sole ground that the employer desires to insure, or has insured the payment of compensation to employes, or de-

sires to indemnify, or has now indemnified himself against loss sustained by the direct payment thereof.

This order shall be effective upon said Frank C. Thornton and said The Cleveland Stamping and Tool Company giving their joint and several bonds herein, with security to the approval of the clerk of this court, conditioned according to law, in the sum of $1000.00.

Approved: John G. Price,
Attorney General,
B. W. Gearheart,
Special Counsel,
For Defendants in Error.
Judson Harmon and
A. I. Vorys,
Attorneys for Frank C. Thornton and The Cleveland Stamping and Tool Company.

BOND.

Know all men by these presents, that we, the undersigned, Frank C. Thornton and The Cleveland Stamping and Tool Company, as principals, and The Aetna Casualty & Surety Company, as surety, are held and firmly bound unto Thomas J. Duffy and Herbert L. Eliot, members of and composing the Industrial Commission of Ohio, in the penal sum of $1000.00, for the payment of which well and truly to be made, we hereby jointly and severally bind ourselves, our executors, administrators and assigns.

Signed this fourteenth day of March, A. D. 1919.

The condition of the above obligation is such that whereas the said Frank C. Thornton and The Cleveland Stamping and Tool Company have this day secured an interlocutory injunction in the Supreme Court of the United States in the foregoing entitled cause.

Now, if the said Frank C. Thornton and The Cleveland Stamping and Tool Company shall pay such costs and damages as may be incurred or suffered by said Thomas J. Duffy and Herbert L. Eliot, members of and composing the Industrial Commission of Ohio, or by any party who may be found to have been wrongfully restrained or enjoined thereby, then this obligation shall be void; otherwise the same shall remain in full force and effect.

Frank C. Thorton and
The Cleveland Stamping & Tool Co.,
By A. I. Vorys,
Their Attorney.

The Aetna Casualty & Surety Co.,
[Seal] By C. A. Pierce, Attorney in Fact.

Approved:

.....,
Clerk of the Supreme Court of the United States.

MEMORANDUM ON APPLICATION FOR INTERLOCUTORY INJUNCTION.

The Workmen's Compensation Law of Ohio permits an employer to exercise his election of paying his premium into the state compensation fund or paying the compensation provided by the law, directly to his employes. Prior to the 1917 amendments, the law permitted this election upon a "finding of fact" by the Industrial Commission of Ohio, that the employer is of sufficient financial ability and credit to render certain the payment of compensation and furnishing the services to employes and their dependents, and upon the employer observing the rules of the Commission, paying in the required amount to the surplus of the state fund and giv-

ing the bond required by the Commission. The finding of fact was an essential prerequisite of the election by the employer to pay compensation directly. The 1917 amendments of the law added the further provision that the Commission must in its finding of fact, certify that the employer does not desire to insure the payment of compensation or indemnify himself against loss sustained by the direct payment thereof, before the employer is entitled to elect to pay compensation directly. It is admitted by demurrers to the petition of Frank C. Thornton and the cross petition of The Cleveland Stamping and Tool Company that, before the amendments of 1917, this finding of fact was duly made as to said parties and those for whom they sue; that they had duly given bond and complied with all the required conditions; that there has been no change in their financial ability to make the payments required or in any other condition; but that the Commission threatens to issue notices revoking said findings and terminating the right of said parties to make payment directly to their employes unless said parties give up and abandon contracts of indemnity and insurance lawfully made and entered into and in full force and effect before said amendments of 1917 and still in full force and effect, and that no other cause or reason existed or exists for said threatened action of the Commission.

We maintain, first, that this amendment is prospective, and does not apply to contracts of insurance or indemnity in force when the amendment was enacted, and second, that it is unconstitutional in attempting to prohibit contracts of insurance and indemnity.

If this court does not enjoin the Commission from taking the threatened action, during the pendency of this proceeding in review, then such employers will instantly lose their several rights to pay compensation directly and cannot longer maintain their insurance contracts. The

right to pay compensation directly, depends upon said finding of fact. If the finding is revoked, then regardless of the erroneous construction of the law and the constitution by the Commission, the finding of fact upon which the employer's right to pay directly depends having been taken away, they no longer have the right to pay directly and cannot carry their insurance contracts longer.

These employers maintain that their rights are fixed by the findings of facts and the conditions authorized and imposed under the act before the 1917 amendments. They maintain that those amendments are unconstitutional and void because they attempt to deprive employers of their right to make contracts insuring or indemnifying them against their direct liability to their employes, imposed upon them by the Workmen's Compensation Law. If the court shall determine that the amendments are valid, they maintain that, by their terms, they are intended to apply only to the contracts of employers made subsequent to the enactment of the amendments. If the Industrial Commission should revoke their findings of fact during the pendency of this action, such revocation would destroy the rights of the employers to pay compensation directly and destroy their insurance contracts. Such revocation would at once force all such employers into the state fund, notwithstanding that the amendment under which the Commission proposes to act, is, as we maintain, unconstitutional and if held constitutional applies, as we maintain, only to future contracts of insurance.

It is apparent, therefore, that the injury to the large number of Ohio employers will be irreparable unless the court allows the interlocutory injunction.

The Court of Common Pleas, the Court of Appeals and the Supreme Court of Ohio each allowed the interlocutory injunction in order to preserve the **status quo pendente lite**. We ask this court to do the same.

Respectfully submitted,

Judson Harmon and

A. I. Vorys,

Attorneys for Frank C. Thornton and The Cleveland Stamping & Tool Company.

JAMES D. MAHER,
CLERK.

Supreme Court of the United States

No. [redacted]376

OCTOBER TERM, 1918.

FRANK C. THORNTON AND THE CLEVELAND STAMPING AND TOOL COMPANY,
Plaintiffs in Error,

vs.

THOMAS J. DUFFY AND HERBERT L. ELIOT, MEMBERS OF AND COMPOSING THE INDUSTRIAL COMMISSION OF OHIO,
Defendants in Error.

In Error to the Supreme Court of the State of Ohio.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

JUDSON HARMON,
A. I. VORYS,
Attorneys for Frank C. Thornton and The Cleveland Stamping and Tool Company.

TOOTHAKER & RODENFELS, Law Printers, Columbus, Ohio

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Supreme Court of the United States

No. 920.

OCTOBER TERM, 1918.

FRANK C. THORNTON AND THE CLEVELAND STAMPING AND TOOL COMPANY,

Plaintiffs in Error,

vs.

THOMAS J. DUFFY AND HERBERT L. ELIOT, MEMBERS OF AND COMPOSING THE INDUSTRIAL COMMISSION OF OHIO,

Defendants in Error.

In Error to the Supreme Court of the State of Ohio.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This is an action to enjoin the Industrial Commission of Ohio from prohibiting or interfering with the right of plaintiffs in error, and all other employers in Ohio similarly situated, to maintain and make contracts indemnifying them against their liability for compensa-

tion under the Workmen's Compensation Law of Ohio on account of injuries and deaths of employes.

Section 22 of the act of March 14, 1913 (103 O. L., pp. 72-92), now Section 1465-69, General Code of Ohio, is set forth on page 71 of the appendix hereto. The same section, as amended March 20, 1917, is set forth on page 74 of the appendix. This act is commonly known as the Workmen's Compensation Law, and we so refer to it in this brief.

Section 54 of the said act (now Section 1465-101, General Code of Ohio), is set forth on page 83 of the appendix. The same section, as amended February 16, 1917, is set forth on page 83 of the appendix.

The amendment to the constitution of Ohio of 1912 authorizing the workmen's compensation fund, is set forth on page 69 of the appendix.

The Amendment of Section 1465-69.

Under Section 1465-69 of the Workmen's Compensation Law, an employer may elect to pay the amounts as fixed by the Industrial Commission into the state compensation fund, or pay them directly to his employes, or their dependents. Under the act of 1913 this section provided that the employer who elected to pay compensation directly, instead of paying into the state fund, should abide by the rules of the Industrial Commission, (formerly called State Liability Board of Awards), and should be of sufficient financial ability or credit to render certain the payment of compensation, or maintain benefit funds or departments, or jointly with other employers maintain mutual associations of such financial ability or credit, to which employes are not required or permitted to contribute; and that the Commission should make a finding of such facts, and require such security or bond as it may deem proper, adequate and sufficient, and the employer so electing was required to pay into

the state fund the amounts as prescribed for the surplus fund.

The amendment of 1917 omitted the provision relating to benefit funds or departments and mutual associations, and added the further provision that employers so electing to pay compensation directly shall be those "who do not desire to insure the payment thereof or indemnify themselves against loss sustained by the direct payment thereof."

The Amendment of Section 1465-101.

Section 1465-101, in the act of 1913, provided for the regulation of contracts indemnifying employers. As amended in 1917, this section provides that all contracts and agreements shall be absolutely void and of no effect which undertake to indemnify or insure employers against loss or liability for the payment of compensation, or which provide that the insurers shall pay such compensation, or which indemnify the employer against damages resulting from his failure to comply with lawful requirements for the protection of the lives, health and safety of employes, or when the same is occasioned by the wilful act of the employer, his officers, or agents, or by which the insurer shall agree to pay such damages. It further provides that no license or authority to enter into any such agreements or policies of insurance shall be granted or issued by any public authority.

This section, as amended in 1917, specifically and effectually revokes the power of insurance companies to make contracts indemnifying employers. We do not contend that insurance companies have had any right to make employer's liability or compensation insurance, or to indemnify employers, since this 1917 amendment. The rights of insurance companies are not involved in this case. The questions involved relate only to the rights of employers.

The Petition and Cross-Petition of the Complaining Employers.

The plaintiff in error, Thornton, in his petition, avers (Rec., p. 18) that he is a manufacturer at Cleveland, Ohio, having more than five, and in fact more than forty, workmen employed in his business; that in January, 1914, upon evidence duly submitted, the Industrial Commission made its finding of facts certifying that he was of sufficient financial ability to render certain payment of compensation; that he gave the required bond; that he paid in the amount required to the surplus fund and duly elected to pay compensation direct to his employes and their dependents; that he continuously has abided by the rules of the Commission, maintained the required bond and paid the required amounts into the surplus fund and is of the required financial ability; that thereupon, in January, 1914, he made his contract with The Aetna Life Insurance Company of Hartford, Connecticut, wherein said company agreed to pay the compensation which should become due from Thornton to his employes and their dependents; that in said contract Thornton agreed to pay the company premiums based upon his payrolls of wages and that said contract was to continue in force until cancelled by either of the parties thereto, upon thirty days' notice; that the contract has not been cancelled and is in full force and effect; that The Aetna Life Insurance Company was then duly licensed in Ohio to indemnify employers against loss or damage for injury or death resulting from accidents to employes, and to make contracts so providing for the payment of compensation due employers to employes.

He further avers that on December 1, 1917, the Industrial Commission adopted a resolution in which it referred to Sections 1465-69 and 1465-101, as amended in

1917, and declared that as to employers who shall provide for insurance for the payment of compensation or indemnify themselves against loss sustained by the direct payment thereof, or who carry any such insurance or contracts of indemnity, the findings of facts of the Commission theretofore issued shall be and stand revoked as of January 10, 1918, and that as a condition to the right to pay compensation directly to employes all employers shall state in writing that they do not desire to insure such payment or insure themselves against loss sustained by such payment and that notices to that effect should be sent to all employers; that unless restrained the Commission would send such notices and revoke the findings of facts of plaintiffs and of other employers who have elected to pay compensation directly to employes and who have such contracts with insurance companies, and will refuse to make and certify the findings of facts, required by the law, to employers of sufficient financial ability, who abide by the rules of the Commission, give the required bond and pay into the surplus fund, if such employers have entered into or shall desire to enter into any contracts indemnifying them against liability for compensation; that plaintiff's contract with The Aetna Life Insurance Company is a valid and subsisting contract and he has the right to maintain it as a means of meeting his liability to his employes and the right to have said contract continue until the same shall be cancelled as therein provided, and that he has the right to make contracts in Ohio and elsewhere, to indemnify him against his liability for compensation to his employes and their dependents; that there are more than six hundred and seventy-five employers in Ohio seeking the relief demanded by plaintiff, and this suit is brought in their behalf.

Further that the acts of 1917, amending Sections 1465-69 and 1465-101, were not intended to and do not apply

to contracts of indemnity existing when said acts took effect, or to contracts between employers and individuals, and were not intended to and do not authorize the Industrial Commission to refuse or cancel the authority of employers to pay compensation directly upon the finding by the Commission that such employers desire to insure the payment thereof, or to indemnify themselves against loss sustained by such payments.

Also that if it shall be determined that said acts were intended to, and do so apply, then said acts of 1917 and said resolution and notices and threatened action of the Industrial Commission are unconstitutional and null and void, in that the same are in contravention of the constitution of Ohio and of Article XIV, Section 1, of the constitution of the United States declaring "Nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law," and of Article I, Section 10 of the constitution of the United States declaring "No state shall pass any law impairing the obligation of contracts."

The prayer is for an injunction against the Industrial Commission sending said notices and revoking, changing or modifying the findings of facts theretofore made and certified by the Commission to plaintiff, and from carrying out the resolution of the Commission, and from revoking or changing its findings of facts on behalf of any employer who is of the required financial ability, who maintains the required bond, abides by the rules of the Commission and pays in the required amounts to the surplus fund, and from refusing the findings of facts to employers who may elect to pay compensation directly to employes and their dependents as provided in said Section 1465-69 and show that they are of the sufficient financial ability, who give the required bond, abide by

the rules, pay in the required amounts to the surplus fund; and from revoking or modifying any finding of facts heretofore made and certified by the Commission or refusing or withholding the finding of facts from any employer, on the sole ground that such employer desires to insure the payment of compensation to employes or to indemnify himself against loss sustained by direct payment thereof.

The answer and cross-petition of The Cleveland Stamping and Tool Company (Rec., p. 27) is substantially the same as the petition of Thornton.

The Judgments of the State Courts.

The defendant in error, the Industrial Commission of Ohio, demurred to the petition of Thornton (Rec., p. 26), and to the answer and cross-petition of The Cleveland Stamping and Tool Company (Rec., p. 33), on the ground that the same do not state facts constituting a cause of action, thereby admitting all the foregoing facts. The demurrers were sustained by the Common Pleas Court (Rec., p. 35), by the Court of Appeals (Rec., p. 40), and by the Supreme Court of Ohio (Rec., p. 45), and final judgments were entered for the defendants therein.

ERRORS RELIED UPON.

I.

The Supreme Court of Ohio erred in affirming the judgment of the Court of Appeals.

II.

The Supreme Court of Ohio should have found that the Court of Appeals erred in sustaining the demurrers to the petition of Thornton and the cross-petition of The Cleveland Stamping and Tool Company.

III.

The judgment of the Supreme Court of Ohio was given for the Industrial Commission, when it ought to have been given for Thornton and The Cleveland Stamping and Tool Company.

IV.

The judgment of the Supreme Court of Ohio is in contravention of Article XIV, Section 1, of the Constitution of the United States.

V.

The judgment of the Supreme Court of Ohio is in contravention of Article I, Section 10, of the Constitution of the United States.

VI.

The Supreme Court of Ohio erred in holding that the act of the General Assembly of Ohio, passed February 16, 1917, amending Section 1465-101, General Code of Ohio, (Appendix, page 83), and the authority thereunder exercised by the State of Ohio, are not in contravention of the provisions of Article XIV, Section 1, and Article I, Section 10, of the Constitution of the United States, notwithstanding said act and the authority thereunder exercised by the state assume to deprive and to deny to these employers the benefit of existing lawful contracts, valid before and at the time said act was passed; and said act, and the authority thereunder exercised by the state, assume to deny to these employers the right to make contracts indemnifying them against their liability to employes, and to insure the payment of the compensation, and the services and aid to employes and their dependents for which they may be liable under the Workmen's Compensation Law of Ohio, and to indemnify themselves against loss sustained by the direct payment thereof.

VII.

The Supreme Court of Ohio erred in holding that the provisions of Section 1465-69, General Code of Ohio, as amended by the act of the General Assembly of Ohio, passed March 20, 1917, (Appendix, page 74), and the authority thereunder exercised by the State of Ohio, are not in contravention of Article XIV, Section 1, and Article I, Section 10 of the Constitution of the United States, notwithstanding said act and the authority thereunder exercised by the state, assume to deprive and to deny to these employers the benefit of existing lawful contracts, valid before and at the time said act was passed; and notwithstanding said act and the authority thereunder exercised, assume to deny to these employers the right to make contracts indemnifying them against their liability to employes, and to insure the payment of compensation, and to pay compensation directly to employes, as provided in the workmen's compensation law of Ohio, on the sole ground that said employers desire to insure the payment thereof, or indemnify themselves against loss sustained by the payment thereof, or that they heretofore have so insured or indemnified themselves.

SUMMARY OF SPECIFICATIONS OF ERROR.

The judgment of the Supreme Court of Ohio, affirming the judgment of the Court of Appeals of Franklin county, sustaining the demurrers to the petition and cross-petition, dismissing the action and refusing to enjoin the Industrial Commission from revoking the "findings of fact" of these employers, in effect erroneously determined:

1. That the amendments of 1917, of Section 1465-69 and 1465-101, General Code, (Appendix, p. 74, 83), apply

to and annul contracts of indemnity made prior to and existing at the time the acts were passed, and which by their terms continued and were in force at the time the judgment was rendered.

2. That the amendments of these sections of 1917, annulled all existing contracts of indemnity, and prohibited employers making any contracts insuring the payment of their liability to employes, and contracts indemnifying them against loss by reason of their payment on account of statutory compensation or liability due to employes.

3. That the 1917 amendment of Section 1465-69, (Appendix, p. 74), which in the provisions relating to employers who elected to pay compensation directly, omitted the provision for benefit funds, or departments, and mutual associations, and provided, as a condition to the right of employers to elect to pay compensation directly, that they shall not desire to insure the payment of compensation, or indemnify themselves against loss sustained by the direct payment thereof, is a legislative deprivation of the employer's right to elect to pay compensation directly, and right to insure such payment, or indemnify against loss sustained by such payment, applying to all existing, as well as all future contracts of insurance and indemnity, and such deprivation is not in contravention of the Constitution.

BRIEF OF ARGUMENT.

I.

The legislature has the power to compel all employers to contribute to the state workmen's compensation fund, or it may provide the conditions upon which employers may pay into the state fund, and the conditions upon which they may pay compensation directly to employes, but the desire of an employer, who elects to pay compensation directly, to indemnify himself cannot be made the sole basis of a legislative classification of employers, distinguishing them as ineligible to pay compensation directly. Such basis of classification is not related to the purpose of the constitutional amendment and the workmen's compensation law.

Adams v. Tanner, 244 U. S., 590.
State ex rel. v. U. S. F. & G. Co., 96 O. S., 250.
Gulf, etc., Ry. Co. v. Ellis, 165 U. S., 150.
C. B. & Q. R. R. Co. v. McGuire, 219 U. S., 549.
City of Chicago v. Netcher, 183 Ill., 104; 48 L. R. A., 261.
Truax v. Raich, 239 U. S., 33.
Ives v. S. B. Railway Co., 201 N. Y., 271.
Chenoweth v. State Board, 57 Colo., 74; 141 Pac., 132.
Byers v. Meridian Printing Co., 84 O. S., 408.
Dunahoo v. Huber, 171 N. W., 123.

II.

The legislature has no power to prohibit employers from insuring or indemnifying themselves against their liability to employes.

(1) Insurance is not inimical to public policy.

Phoenix Ins. Co. v. Erie & West. Transportation Co., 117 U. S., 312.
Allgeyer v. Louisiana, 165 U. S., 578.

(2) Liability insurance is not inimical to public policy.

American Casualty Company's case, 83 Md., 535.
Kansas City, etc., Railroad Co. v. Southern, etc., News Co., 151 Mo., 373; 45 L. R. A., 380.
Breeden v. Frankfort M. A. & P. Ins. Co., 220 Mo., 327.
Stone v. Old Colony S. R. Co., 212 Mass., 459.
Rumford Falls Co. v. F. & C. Co., 92 Me., 574.
Hoadley v. Purifoy, 107 Ala., 276; 30 L. R. A., 351.

(3) Contracts indemnifying employers are not inimical to public welfare and the legislature cannot prohibit such contracts.

Adams v. Tanner, 244 U. S., 590.
Allgeyer v. Louisiana, 165 U. S., 578.
Dobbins v. Los Angeles, 195 U. S., 223.
Yee Gee v. San Francisco, 235 Fed., 757.
German Alliance Ins. Co. v. Kansas, 233 U. S., 389.
Chenoweth v. State Board, 57 Colo., 74.
Wilson v. New, 243 U. S., 347.

III.

Assuming, for the purpose of this branch of the argument only, that the state fund "insures" the compensation due to employes from employers, and, that the law may give the state fund a monopoly of such insurance and deny the right to issue such insurance to all others, still the law can not (1) abrogate existing insurance, valid when it was issued, or, (2) take away the right of the employer to procure other insurance by making contracts of insurance in other states, or by any other means over which the state has no control.

(1). The state cannot abrogate existing insurance, valid when it was issued.

Bedford v. Eastern Building & Loan Ass'n., 181 U. S., 227.
American Building & Loan Ass'n. v. Rainbolt, 48 Nebr., 434, 67 N. W., 493.
McNamara v. Keene, 98 N. Y. S., 860.
Industrial Building & Loan Ass'n. v. Myers, 12 Ariz., 48; 95 Pac., 115.

(2). The state cannot take away the right of the employer to procure other insurance by making contracts of insurance in other states, or by any other means over which the state has no control.

Stone v. Old Colony S. R. Co., 212 Mass., 459.
N. Y. Life Ins. Co. v. Dodge, 246 U. S., 357.
Allgeyer v. Louisiana, 165 U. S., 578.

IV.

Neither section 1465-69 nor section 1465-101, as amended in 1917, was intended to apply, and they do not apply to contracts theretofore made by employers.

Sturges v. Carter, 114 U. S., 511.
Bernier v. Becker, 37 O. S., 72.
Kelly v. Kelso, 5 O. S., 198.
State v. Creamer, 85 O. S., 349.
Hathaway v. Mutual Life Ins. Co., 99 Fed., 534.
Burridge v. New York Life Ins. Co., 211 Mo., 158; 109 S. W., 560.
Black's Constitutional Law, 3rd Ed., Sec. 296.
Lewis' Sutherland Statutory Construction, 2nd Ed., Sec. 642.

The plan of workmen's compensation as operated by the State Industrial Commission under the law of Ohio, is not insurance.

I.

THE LEGISLATURE HAS THE POWER TO COMPEL ALL EMPLOYERS TO CONTRIBUTE TO THE STATE WORKMEN'S COMPENSATION FUND, OR IT MAY PROVIDE THE CONDITIONS UPON WHICH EMPLOYERS MAY PAY INTO THE STATE FUND, AND THE CONDITIONS UPON WHICH THEY MAY PAY COMPENSATION DIRECTLY TO EMPLOYES, BUT THE DESIRE OF AN EMPLOYER, WHO ELECTS TO PAY COMPENSATION DIRECTLY, TO INDEMNIFY HIMSELF CANNOT BE MADE THE SOLE BASIS OF A LEGISLATIVE CLASSIFICATION OF EMPLOYERS, DISTINGUISHNG THEM AS INELIGIBLE TO PAY COMPENSATION DIRECTLY. SUCH BASIS OF CLASSIFICATION IS NOT RELATED TO THE PURPOSE OF THE CONSTITUTIONAL AMENDMENT AND THE WORKMEN'S COMPENSATION LAW.

The Industrial Commission maintains, and the Supreme Court of Ohio has determined, as one of the grounds sustaining the validity of the acts in question, that the legislature has the power to compel all employers to contribute to the State Workmen's Compensation Fund, and therefore may impose any conditions it sees fit upon the right of an employer to elect to pay compensation directly to his employes.

Donahue, J., in rendering the opinion of the Supreme Court of Ohio, said:

> "it necessarily follows that if the General Assembly has the power at any time to withdraw from these employers this privilege to elect to pay said compensation and furnish such services and atten-

> tion and funeral expenses directly, it can from time to time impose such conditions as in its judgment seems wise and necessary to safeguard the main purpose and intent, not only of the act itself, but of the constitutional provision under authority of which this law was passed. It also follows that whoever seeks to avail himself of the benefits of this exception in his favor, must comply with the conditions imposed." (Rec., p. 50.)

This proposition in effect is that the legislature, having the power to compel all employers to pay into the state fund, can affix any condition it chooses to the right of an employer to stay out of the fund and pay compensation directly; that the legislature can classify employers as eligible to pay into the fund and eligible to pay compensation directly upon any bases it may choose to establish; that the basis of classification rests entirely and exclusively upon the judgment of the legislature as to the conditions which it deems "wise and necessary;" that therefore the court has no power to inquire into considerations promoting the legislation; that the court cannot inquire whether the conditions imposed are or are not related to the purpose of the compensation law, or whether the conditions are calculated to promote the object of the workmen's compensation fund.

The power of the legislature in fixing the conditions upon which an employer may exercise his election to pay into the state fund or pay compensation directly, as urged by the Industrial Commission and as adjudged by the Supreme Court of Ohio, is analogous to the power of the legislature over foreign corporations. The legislature may fix any conditions it chooses, to the right of a foreign corporation to operate in the state. The legislature is the sole judge of such conditions. The court has no jurisdiction to examine into the conditions upon which the legislature admits or excludes foreign corporations, or the motives inspiring it. The Commission urges and

the Supreme Court of Ohio has determined that likewise the court has no jurisdiction to examine into the conditions upon which the legislature permits employers to exercise their election under the workmen's compensation law, or the motives inspiring it. The Commission urges and the Supreme Court of Ohio has determined that the state may compel employers to abrogate any supposed right to insurance as a condition to exercising their election, because the legislature can exact any condition it chooses, regardless of whether the state, in the exercise of its police power, may or may not prohibit insurance.

We maintain that the prohibition of the right of an employer to insure or indemnify himself against his liability to his employes does not promote the purpose of the Ohio workmen's compensation law and has no reasonable relation to the purpose of that law. We maintain that a classification of Ohio employers, eligible to exercise their election of paying into the state compensation fund or paying compensation directly to employes, based upon the employers not maintaining contracts indemnifying them against their liability to employes, does not rest upon any difference bearing any reasonable or just relation to the purpose sought to be accomplished by the workmen's compensation law; that such classification is arbitrary, unreasonable and without any justifiable basis; and that its authority over the subject is not absolute as it is over foreign corporations wishing to enter the state.

The purpose of the workmen's compensation law is to secure to every employe (of all employers having five or more employes), the payment of compensation, either by payment out of the state fund to employes of employers who pay into the fund or by payment directly to employes by employers who do not pay into the state fund. (See Sections 1465-68 and 1465-61, Appendix, pp. 70, 69.)

All such employers are under the jurisdiction of the State Industrial Commission to determine the amount and to require the payment of the compensation. Section 1465-72 (Appendix, p. 76) authorizes the Commission to disburse the state fund to the employes of employers who have paid into the fund, and requires employers electing directly to compensate their employes to pay to them or to their dependents the same compensation, etc., as if such employer had paid into the state fund. Section 1465-74 (Appendix, p. 77) provides for an employer who has failed to make his election, and authorizes the Commission to fix the amount of compensation of employes of such employers, which shall be paid within ten days, and upon default the state shall commence an action to recover the amount with a penalty of fifty per cent. The same jurisdiction and like proceedings are therein provided for the benefit of employes of employers who have duly made their election to pay compensation directly. Section 1465-90 (Appendix, p. 80) confers full power and authority upon the Commission to hear and determine all questions within its jurisdiction and declares that its decision thereon shall be final (subject to the right of appeal in certain cases).

Prior to the 1917 amendment, Section 1465-69 required the employer who elects to pay compensation directly to abide by the rules of the Commission, to show that he is of sufficient financial ability or credit to render certain the payment of compensation, or that he maintains benefit funds or departments or mutual associations of such financial ability or credit, and that he should give the required bond.

These are all provisions easily seen to be appropriate in carrying out the purpose of securing compensation to employes. But how is it possible to conceive of this manifest purpose of the law to secure payment of com-

pensation to employes being effectuated or promoted or safe-guarded by forbidding the employer who assumes the direct liability from making or carrying out contracts by which he is insured or indemnified against his liability to his employes. The insurance or indemnity does not affect the liability of the employer to his employes in the slightest degree. He is financially able. He gives the required bond and he and his bond are liable to his employes after making the insurance or indemnifying contract, precisely the same as if no such contract had been made. The insurance or indemnity can only increase his means of performing his duty under the law to his employes. It cannot possibly lessen his means or his liability. Even the insolvency of the insurer could not affect them. The employes are not compelled to resort to the liability of the insurer. They have no privity and no relations whatever with the insurer. The employes look to the employer for compensation. They are protected and secured before any insurance or indemnity contract is procured by the employer. The insurance procured by the employer cannot possibly diminish his responsibility to his employes. It can only increase his means of meeting that responsibility.

But **Judge Donahue**, in rendering the opinion of the Supreme Court of Ohio, seemed to think (Rec., p. 51) that if the Industrial Commission should find that such contract of insurance or indemnity furnishes an opportunity for unfair or fraudulent settlements, this might justify the law forbidding such contracts. Indeed he seemed to think that upon such grounds the Industrial Commission would have the power without the prohibition in the law of 1917.

If abuses develop in the management of any business not itself inherently immoral or dangerous to public welfare, we maintain that, as held in **Adams v. Tanner**, 244

U. S., 590, 594, this is not enough to justify the destruction of the right to carry on such a business. However, if the possibility of such abuses assumed by the Supreme Court of Ohio could justify the validity of such a law, they seem beyond the pale of this case, for the Industrial Commission has the same jurisdiction and power over the payment of compensation by the employers who pay directly as it has over the state fund, and the same jurisdiction and power to protect employes in their claims against such employers, as in the protection of the claims of employes against the state fund. (Sections 1465-74 and 1465-90. Appendix, pp. 77, 80.)

State ex rel. v. U. S. F. & G. Co., 96 O. S., 250, a quo warranto action against an insurance company issuing contracts indemnifying employers who elect to pay compensation directly, was decided April 17, 1917. **Nichols, C. J.**, referring to Section 22 (Sec. 1465-69) as it stood prior to the 1917 amendment (Appendix, p. 71), said:

> "By the terms of this section the industrial commission retains and must exercise the most complete supervision over the award and payment of compensation by those who by permission of the commission are permitted to pay directly to injured or the dependents of killed employes. The employe is favored with the most complete guarantee that he will receive the same benefits he would have received had his employer contributed to the state insurance fund. The underlying purpose of the compensation act is in no manner thwarted." (Opinion, p. 253.)

Referring to the contention that the classification of employers in this section is arbitrary, **Nichols, C. J.**, continues:

> "It is possible that all of the employers of the state might have elected to pay the compensation direct to the injured employe. Had this been the case, there would still be a large field for the board of awards to occupy, for it would still be the law-chosen intermediary between the employer and employe, to see that justice is done in every case. And, again, it

were possible that no employer would avail himself of the system of paying direct.

However, the choice of the two methods is open to all. The law creates no favored class; it only conditions the choice by the necessities of the case, in order that the compensation may be certain." (p. 255.)

"If the law is faithfully administered, and we are bound to assume that it is and will be, there is absolutely no discrimination between the employes of contributing employers and noncontributing employers, nor can there be.

The state board of awards that administers the fund contributed by the employers exercises the closest scrutiny and control over those employers who pay direct. So far as we can see, the only difference is in the person of the paymaster—in the one case, the state, and, in the other, the employer. The law expressly provides that the compensation when paid direct shall in no event be less than that paid out of the state insurance fund. As heretofore stated, the board of awards must be satisfied of the financial ability of the noncontributing employer, and is further authorized to require such security or bond from such employers as it may deem proper, adequate and sufficient to secure to injured employes the payment of compensation. In other words, the state board of awards is clothed with full authority to make certain the payment of compensation, just as certain in fact as if the state fund itself was to be drawn upon.

If, then, the compensation in the one case is to be as great as in the other, and if the prompt payment is as certain in the one case as in the other, the claim of inequality before the law is dissipated to the very vanishing point." (pp. 256, 257.)

"* * * Section 22 neither authorizes nor denies the right of employers to enter into indemnity contracts to protect them from loss or damage from injury to employes, and we cannot see how any injured employe, or the dependent of any killed employe, is compelled to rely upon an insurance indemnity company to secure their compensation, or to have any relation whatever with such companies. If an injured employe elects to avail himself of the provisions of the workmen's compensation act, the law

> protects just as amply the employe of a noncontributing employer as the employe of one who has contributed to the fund." (pp. 257, 258.)

The law of the state of Washington which was condemned in **Adams v. Tanner, supra**, and the laws of Ohio, in question in this case, seem to have been promoted and enacted under like impulse and motive.

Ohio has a state commission managing a state fund. Employers are not compelled to patronize the state fund. All employers may contribute to the state fund, or, all employers may stay out of the state fund and pay compensation to their employes directly. (This is subject to the exception of such employers as might be unable to show financial standing or give the required bond.) But under the urging of advocates of the state fund, the legislature enacted a law which, while not compelling employers to patronize the state fund, prohibited employers who elect to pay compensation directly from insuring their liability to employes. The law does not compel an employer to adopt the state plan of providing for compensation, but it prohibits employers from adopting any other plan.

In the state of Washington the government established public employment bureaus. Workmen were not compelled to patronize the public employment bureaus. But the employment agency law prohibited private bureaus which collected fees from workmen and thereby prevented workmen from patronizing the private bureaus. While not compelling employes to patronize the public bureaus, the law sought to create a monopoly in the public bureaus by preventing workmen dealing with private bureaus.

The Ohio law prohibits all employers' liability insurance and requires employers to forfeit their right to insure their liability as a condition to paying compensa-

tion directly instead of through the state fund. The Washington law, while not phrased in the same terms, was actuated by and effectuated the same purpose, for, in effect, it provided that a workman should patronize the public employment bureau or forfeit his right to such service by any one. The right of a workman to elect not to patronize the state employment bureau and to seek employment through other means, was, by this law, conditioned on his not patronizing a private employment agency which collected a fee from the workmen.

The Washington law was condemned as a deprivation of the right to operate an employment bureau. Upon the same principle it was a deprivation of the workmen's right to deal with employment agencies. We are not urging upon the court any rights of insurance companies but maintain that the Ohio laws in question are the same deprivation of employers' rights as the Washington law was of the workmen's rights.

In the instant case it was urged, and the Supreme Court of Ohio has determined, that it is the purpose of the law "to create and maintain one insurance fund to be administered by the state" (Rec., p. 52), and that to accomplish this purpose the legislature may prohibit all other modes of providing for the employers' liability. If this proposition is sound, then it could have been said in **Adams v. Tanner,** that the law establishing public employment agencies and the law prohibiting private agencies which charged fees to workmen, manifested a legislative purpose to establish one agency through which workmen might seek employment, and that to accomplish this purpose the legislature could, as it did, provide that a workman should deal directly with employers, or if he sought an employment agency he could only find it in the public bureau.

In **Gulf, etc., Ry. Co. v. Ellis,** 165 U. S., 150, the law of Texas providing for an attorney's fee to be taxed in costs

in certain suits against railroads, was under consideration. **Mr. Justice Brewer** quoted with approval from **State v. Loomis**, 115 Mo., 307, 314:

> "Classification for legislative purposes must have some reasonable basis upon which to stand." (p. 155.)

And on the same page, he says:

> "* * * classification cannot be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

Further, on **page 154**, it is said:

> "While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining state action."

Mr. Justice Hughes in **C. B. & Q. R. R. Co. v. McGuire**, 219 U. S., 549, after referring to authorities, says:

> "The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract;" etc.

and quoting from **McLean v. Arkansas**, 211 U. S., 547, 548:

> "* * * if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail." (pp. 569, 570.)

Mr. Justice McReynolds quoted the same language from **McLean v. Arkansas**, in **Adams v. Tanner, supra,** at p. 596.

In **Truax v. Raich**, 239 U. S., 33, this court considered the Arizona statute which required an employer of five or more employes to employ only twenty per cent of aliens. **Mr. Justice Hughes** said:

> "The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor is necessarily involved." (pp. 41-42.)

And further:

> "We have frequently said that the legislature may recognize degrees of evil and adapt its legislation accordingly (citing cases); but underlying the classification is the authority to deal with that at which the legislation is aimed. * * * The discrimination is against aliens as such in competition with citizens in the described range of enterprises and in our opinion it clearly falls under the condemnation of the fundamental law." (p. 43.)

The analogy between this Arizona law and the Ohio law in question is apparent in this, that the Arizona law prohibited an employer of five or more employes from operating a factory and employing workmen, except on condition that he do not employ more than twenty per cent of aliens, and prohibited alien employes seeking employment from such employer, while the Ohio law in effect prohibits an employer of five or more employes from

operating a factory and employing workmen except on condition that he do not insure the workmen's compensation, and prohibits workmen seeking employment from such employer.

In the **City of Chicago v. Netcher**, 183 Ill., 104; (48 L. R. A., 261), the ordinance of Chicago, directed against department stores, prohibited the sale of meats, fish, etc. where drygoods, clothing, etc., were sold. The court say:

> "* * * This is not a regulation but a prohibition, and a purely arbitrary one, which attempts to deprive certain persons of exercising a right which has always been lawful and has been heretofore exercised throughout the State and country without question." (pp. 109, 110.)

The effect of the ordinance was to deny the right to sell meat and fish except on condition that the dealer should not sell drygoods or clothing, or to deny the right to sell drygoods except on condition that the dealer should not sell meat or fish. The court say:

> "* * * It certainly cannot be contended that there is anything in the character of drygoods, clothing, jewelry and drugs which renders it dangerous to the public or inimical to the general welfare that they should be sold in the same building with provisions." (p. 111.)

On the same principle, the legislature cannot condition an employer's right to pay compensation directly on his abandonment of his right to indemnify himself. As the prohibition of the sale of meat in a store where drygoods are sold can have no reasonable or just relation to the right to sell drygoods, so prohibition of indemnity insurance can have no reasonable or just relation to the right to pay compensation directly to employes.

The court said with respect to the Chicago ordinance:

> "* * * It is plain that its object is not to protect the health, morals or safety of the public or to accomplish any object falling within the police power. It is a mere attempt to deny a property

right to a particular class in the community where all other members of the community are left to enjoy it." (p. 112.)

In effect it was held that the basis of classification denying to some the privilege of dealing in commodities which all others enjoyed, was not a reasonable basis of classification.

In **Ives v. S. B. Railway Co.**, 201 N. Y., 271, it was said:

"* * * A state may classify persons and objects for the purpose of legislation provided the classification is based on proper and justifiable distinctions. * * *."

"In order to sustain legislation under the police power the courts must be able to see that its operation tends in some degree to prevent some offense or evil, or to preserve public health, morals, safety and welfare. If it discloses no such purpose, but is clearly calculated to invade the liberty and property of private citizens, it is the duty of the courts to declare it invalid, for legislative assumption of the right to direct the channel into which the private energies of the citizen may flow, or legislative attempt to abridge or hamper the right of the citizen to pursue, unmolested and without unreasonable regulation, any lawful calling or avocation which he may choose, has always been condemned under our form of government." (Syl.)

In **Chenoweth v. State Board**, 57 Colo., 74, (141 Pacif., 132), the act in question made it a misdemeanor for a physician to publish certain advertisements. In demonstrating that the classification which discriminated aganst physicians was unsound, the court said:

"The offense, if it be one, is a public one, equally applicable to all persons. At the time of the action of the state board in this case, there was no statute making such publication an offense as against others than physicians. The statute under consideration makes the act an offense only when committed by a physician, and for such reason is clearly discriminatory in that it applies to a class of citizens only, and for such reason alone was void." (p. 87.)

The ownership of property and operation of an industry entail liability for injuries resulting from or incident to such ownership or operation suffered by any one, whether he be an employe or not. The owner of a building, for instance, is liable to strangers as well as employes for injuries resulting from the operation of an elevator contrary to lawful requirements. The Ohio law prohibits insurance of the liability to employes. It permits insurance of the same liability by all persons except employers in their liabilty to employes. The law therefore is discriminating in condemning and prohibiting insurance of liability by one class of citizens or on behalf of one class while permitting insurance of the same liability by or on behalf of another. The employer may not insure on behalf of his employes, but he and all others may insure on behalf of strangers.

In **Dunahoo v. Huber** (Iowa), 171 N. W., 123, it was held that a statute prohibiting employes in certain occupations from accepting tips is invalid. The court stating that "In so far as the public is concerned, the evil of tipping the employer is quite as obnoxious to good morals as though it were done to the employe. Surely, here there is no ground for discrimination," and held the prohibition "is unfair discrimination and such legislation is prohibited by the section of the Constitution quoted." (p. 124.)

Upon the authority of **Chenoweth v. State Board**, and **Dunahoo v. Huber**, the legislation in question in the instant case is void because it is discriminating in applying to a class of citizens only.

In **Byers v. Meridian Printing Co.**, 84 O. S., 408, the statute under consideration was the amendment to the libel law of 1900 (sec. 11, 343, General Code of Ohio), providing that if the publisher, upon demand, publish a retraction, the presumption of malice should thereby be

rebutted. **Davis, J.**, in rendering the opinion of the court, said:

> "* * * We are not disposed to question, at least for our present purpose we will not, that a citizen may waive a constitutional right, but we do deny that he can be compelled to waive his right or that he can be arbitrarily subjected to an option to stand upon one right under penalty of losing another. Under this statute the plaintiff is given the choice of resorting to the courts without the right of demanding a retraction, or of demanding a retraction, and, if given, being limited in his right of recovery; and if he chooses either course, he must do it at his own peril and without any recompense whatever." (p. 422).

This decision in effect was that a classification which denied to persons who demand a retraction rights enjoyed by all others, is unconstitutional. We maintain that a classification which denies to employers who indemnify themselves the right, enjoyed by all others, of paying compensation directly, is unconstitutional.

In **Jeffrey Mfg. Co. v. Blagg**, 235 U. S. 571, this court considered the Ohio Workmen's Compensation Law of 1911. The court held that the classification of employers into those employing five or more and those employing less than five workmen was a valid classification, but it was upon the grounds that the classification was not arbitrary and unreasonable and that it comported with the general purpose of the law.

The proposition sustained by the Supreme Court of Ohio that the legislature can impose such conditions as it pleases, to the right of employers to elect to pay compensation directly to employes, so that whoever seeks to avail himself of the right to such election must comply with the conditions imposed, is in conflict with the principles established by the foregoing authorities.

The Ohio Workmen's Compensation Law of 1911 was elective. The employer had the right to pay into the

state fund, or stay out of the state fund. The constitutional amendment of 1912 gave authority to the legislature to compel employers to come into the state fund, but the act of 1913 did not compel all employers having five or more workmen to come into the fund. The act of 1913 also was elective and employers were permitted to come into the state fund or stay out of the state fund. It is true that section 1465-69, in form, directs all employers to pay into the state fund, and that the right to stay out of the state fund and pay compensation directly, upon showing financial ability and giving the bond, is in the form of a proviso. But this mere form of the statute is not sufficient to characterize contributions to the fund as a duty, and paying compensation directly to employes as a privilege. The statute would have been just as effective if it had declared the direct liability of employers to employes, with a proviso allowing employers to contribute to the state fund. Neither paying into the state fund nor paying compensation directly is a privilege. Each is a duty imposed by the law. Each is a burden upon the employer. Each is the legal equivalent of the other. The Supreme Court of Ohio, however, regarded the employer who elected to pay directly, as enjoying "the privilege of electing to pay compensation individually or from a benefit fund, department or association" (Rec., p. 51), and as one seeking "to avail himself of the benefits of this exception in his favor" (Rec., p. 50), and as it was a privilege and benefit conferred upon him by the legislature, it could impose such conditions to the enjoyment thereof as the legislature might fix.

We maintain that the choice between the two alternative duties, each effectuating the same purpose, namely, securing compensation to employes, cannot be established by the arbitrary **ipse dixit** of the legislature. Any such conditions must have such a relation to the purpose of securing the compensation to employes that it may be

seen that the purpose is promoted by the conditions imposed. In so far as the relations between employers and employes are concerned, the amendments of 1917 do not change the law. Those relations are precisely the same after the amendments as they were before. The prohibition of indemnity insurance has no effect in any particular on the continuing relation of employers to employes. The amendments have effect on the employers only, and the only effect they have is to deprive them of increasing their means of meeting their liability.

Donahue, J., said:

> "* * * it is in furtherance of the purpose and intent of the constitution and the law, to create and maintain one insurance fund, to be administered by the state, out of which fund compensation shall be paid to workmen and their dependents", etc. (Rec., p. 52.)

and further, that

> "* * * it would not only be arbitrary, unfair, and without purpose, to permit some employers of labor to enter into contracts of insurance with private companies, and compel all other employers to contribute to the state insurance fund, but it would also hinder, and perhaps utterly demoralize the method and defeat the object and purpose of the creation of such a fund." (Rec., p. 52.)

We quote the foregoing language to show that the court considered the purpose of the workmen's compensation law was to establish one insurance fund out of which the compensation shall be paid, whereas the clear purpose of the law is to secure compensation to workmen either through the state fund or the direct payment by employers. Under the law, as it was enacted in 1911, before the constitutional amendment and as it was enacted in 1913, after the constitutional amendment, and as it is now under the 1917 amendments, the state fund could be without a single contributor, and this could happen by all employers exercising their right of election under

the law to pay compensation directly. Clearly it was not the purpose of the law to establish one fund out of which compensation should be paid. Clearly the purpose of the law was, and is, merely to secure compensation to employes.

The purpose of the law is declared by the Supreme Court of Ohio in **State ex rel. v. U. S. F. & G. Co., supra.** We quote the following from the opinion of **Nichols C. J.**:

> "By the terms of this section (1465-69, Appendix, p. 71) the industrial commission retains and must exercise the most complete supervision over the award and payment of compensation by those who by permission of the commission are permitted to pay directly to injured or the dependents of killed employes. The employe is favored with the most complete guarantee that he will receive the same benefits he would have received had his employer contributed to the state insurance fund. The underlying purpose of the compensation act is in no manner thwarted." (p. 253.)

> "It is not always an easy matter, by the mere examination of a statute, where classification of any sort is attempted, to determine whether the classification is arbitrary, unreasonable and unnatural. Probably one of the most sensible tests is to determine whether any substantial favor is gained by the one class or any greater burden is fastened on the other by reason of the classification.

> Measured by this test, it is felt that the assaults on this section (1465-69) must fail. Neither employer, employe, nor the state, suffers any additional burden, nor are they subjected to any substantial discrimination.

> It is possible that all of the employers of the state might have elected to pay the compensation direct to the injured employe. Had this been the case, there would still be a large field for the board of awards to occupy, for it would still be the law-chosen intermediary between the employer and employe, to see that justice is done in every case. And, again, it were possible that no employer would avail himself of the system of paying direct.

However, the choice of the two methods is open to all. The law creates no favored class; it only conditions the choice by the necessities of the case, in order that the compensation may be certain" (p. 255.)

"The state itself suffers no additional burden by reason of any number of employers electing to pay the compensation direct. In fact, the labors of the commission and the expense incident thereto are lessened to the extent that compensation is paid directly to the employe. The employe cannot suffer either through delay or diminution of award.

In view of above facts we are unable to observe in the terms of Section 22 (1465-69) any denial of the constitutional guarantee of equal protection before the laws.

If the law is faithfully administered, and we are bound to assume that it is and will be, there is absolutely no discrimination between the employes of contributing and noncontributing employers, nor can there be.

The state board of awards that administers the fund contributed by the employers exercises the closest scrutiny and control over those employers who pay direct. So far as we can see, the only difference is in the person of the paymaster—in the one case, the state, and, in the other, the employer. The law expressly provides that the compensation when paid direct shall in no event be less than that paid out of the state insurance fund. As heretofore stated, the board of awards must be satisfied of the financial ability of the noncontributing employer, and is further authorized to require such security or bond from such employers as it may deem proper, adequate and sufficient to secure to injured employes the payment of compensation. In other words, the state board of awards is clothed with full authority to make certain the payment of compensation, just as certain in fact as if the state fund itself was to be drawn upon.

If, then, the compensation in the one case is to be as great as in the other, and if the prompt payment is as certain in the one case as in the other, the claim of inequality before the law is dissipated to the very vanishing point." (pp. 256, 257.)

The manifest purpose of the law, as thus clearly set forth, is to secure compensation to employes either through the state fund or the direct payment by employers. That purpose has not been changed by the amendments of 1917. How then can it be said that contracts indemnifying employers who elect to pay compensation directly would "hinder, and perhaps utterly demoralize the method and defeat the object and purpose of the creation of such a fund", as stated in the opinion announced by Judge Donahue?

II.

THE LEGISLATURE HAS NO POWER TO PROHIBIT EMPLOYERS FROM INSURING OR INDEMNIFYING THEMSELVES AGAINST THEIR LIABILITY TO EMPLOYES.

The Industrial Commission maintains and the Supreme Court of Ohio has determined, as one of the grounds sustaining the validity of the acts in question, that the legislature has the power to prohibit an employer insuring or indemnifying himself against his liability to his employes; and that, as the law may prohibit the insurance, it may prohibit the carrying out of pre-existing contracts which provide for the insurance.

We admit the power of the legislature to **regulate** insurance, including insurance of employers' liability. We admit the power of the legislature to **regulate** and to **prohibit** insurance corporations, and we admit that the legislature of Ohio, by the 1917 amendment of Section 1465-101, has revoked the authority of insurance corporations to make any kind of insurance or indemnity against employers' liability.

But we maintain that the legislature has no power to prohibit any person from seeking, procuring and main-

taining insurance or indemnity against any risk, hazard, damage, loss or liability which he apprehends he may suffer in the conduct of any legitimate enterprise. Therefore the legislature has no power to prohibit an employer insuring or indemnifying himself against the liability to his employes and their dependents imposed upon him by the law on account of injuries and deaths growing out of the employment.

We know of no adjudicated case holding that the institution of insurance or the business or contracts of insurance are inherently immoral or dangerous to public welfare. The only objection that possibly could be urged against insurance is that it tends to make the insured careless or corrupt; that fire insurance leads to carelessness and incendiarism; life insurance leads to homicide; liability insurance leads to carelessness respecting the rights of others. This idea has been repudiated repeatedly by the courts.

That the legislature cannot prohibit insurance, and specifically insurance indemnifying an employer against his liability to employes, is sustained by the principle that such insurance is not inimical to public welfare, and in taking such indemnity the employer does not diminish his own responsibility but rather increases his means of meeting that responsibility. This principle prevails and sustains all insurance, even though it may involve insurance against loss resulting from the insured's negligence.

Among the authorities supporting the proposition that insurance is not inimical to public policy are the following:

In **Phoenix Ins. Co. v. Erie & West. Transportation Co.**, 117 U. S., 312, **Mr. Justice Gray**, at **page 324**, said:

> "No rule of law or of public policy is violated by allowing a common carrier, like any other person having either the general property or a peculiar interest in goods, to have them insured against the

> usual perils, and to recover for any loss from such perils, though occasioned by the negligence of his own servants. By obtaining insurance he does not diminish his own responsibility to the owners of the goods, but rather increases his means of meeting that responsibility."

Mr. Justice Gray referred to the contention that a carrier could not insure the goods he had agreed to transport against loss from the negligence of the master and crew of the ship, and stated that if this were true "some trace of the distinction would be found in the books. But the learning and research of counsel have failed to furnish any such precedent." (p. 324.)

In **Allgeyer v. Louisiana**, 165 U. S., 578, the act condemned as unconstitutional prohibited any person doing "any act in this state to effect for himself or for another insurance on property then in this state" in an unlicensed company. Allgeyer who had a policy made in New York with The Atlantic Mutual Insurance Company, notified the company from New Orleans, to bind the insurance on a cargo of cotton from New Orleans. **Mr. Justice Peckham** said:

> "It is natural that the state court should have remarked that there is in this 'statute an apparent interference with the liberty of defendants in restricting their rights to place insurance on property of their own whenever and in what company they desired.' Such interference is not only apparent, but it is real, and we do not think that it is justified for the purpose of upholding what the State says is its policy with regard to foreign insurance companies which had not complied with the laws of the State for doing business within its limits." (pp. 588-589.)
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> . . . . . .
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> "Has not a citizen of a State, under the provisions of the Federal Constitution above mentioned, a right to contract outside of the State for insurance on his property—a right of which state legislation cannot deprive him? We are not alluding to acts done within the State by an insurance company or its

agents doing business therein, which are in violation of the state statutes." (pp. 590-591.)

Supporting the proposition that liability insurance is not inimical to public welfare, we submit the following authorities:

In **American Casualty Company's case**, 82 Md., 535, it was said:

> "Whilst the carrier will not be permitted by contract or otherwise to exempt himself from liability for losses caused by his own negligence or the negligence of his servants, there is no reason of public policy which prohibits him from contracting with a third person for insurance against these very same losses. Consequently he may by insurance indemnify himself against loss of or injury to property entrusted to his care, even where the loss or injury is caused by his own or his servant's negligence. This was decided in **Phoenix Ins. Co. v. Erie & West Trans. Co.**, 117 U. S., 324; and the ground upon which the decision was based was that such insurance did not diminish the carrier's own responsibility to the owner of the goods, but increased the means of meeting that responsibility. * * *." (pp. 576, 577.)
>
> "* * * But they (policies or contracts of indemnity) are all, it is alleged, repugnant to public policy because by furnishing the carrier with a fund with which to reimburse himself for losses caused by his own negligence, their inevitable tendency or effect is to induce less vigilance, or to promote greater carelessness on the part of the carrier. Precisely the same reasoning would invalidate, as repugnant to public policy, every species of fire and marine insurance. To the extent that a fire insurance policy affords an individual protection against loss, to exactly the same extent may it be said the assured will become indifferent in guarding against casualties from fire. And in so far as a carrier may have a policy covering goods, and insuring them for his own benefit against losses arising from his or his servant's negligence just so far will he be either tempted to be negligent, or become indifferent as to vigilance. But in neither instance can it be said that because a temptation to be negligent, may possibly

result from the possession of an insurance policy, the contract of insurance necessarily begets negligence or conflicts with public policy. * * * And, unless it be assumed as a postulate that the mere possession of an indemnity will of itself necessarily and invariably produce negligence, it does not logically follow that such a policy or indemnity is even incidentally or indirectly repugnant to public policy." (pp. 577, 578.)

In **Kansas City, etc., Railroad Co. v. Southern, etc., News Co.**, 45 L. R. A., 380, (151 Mo., 373), it was held:

"A contract by which a news company indemnifies a railroad company against any loss sustained by reason of any injury to employes of the news company, who are carried by the railroad company, is not against public policy."

Brace, P. J., quoted the foregoing extract from the opinion in the **American Casualty Company's** case, and said:

"The only distinction between those cases and the one in hand is that in those the contracts were formal contracts of insurance with insurance companies, while the contract in question is a contract of indemnity by a news company. But a mere contract of insurance is nothing more nor less than a contract of indemnity against loss, as is this with the defendant, and the principles governing must be the same in each; and, as nothing can be predicated of the contract in this case which could interfere with or affect the liability of the carrier to the person injured, there is nothing in it to take it out of the principle of those cases or render it obnoxious to public policy. Hence we conclude that this contract cannot be avoided as against public policy." (pp. 385, 386.)

In **Breeden v. Frankford M. A. & P. Ins. Co.**, 220 Mo., 327, it was held:

"A distinction between fire, life and marine insurance, as being valid and as not affecting the rights of third parties, and indemnity insurance against losses arising from the insured's negligence to third

parties, is without substance. If one is valid, so is the other. To overthrow indemnity insurance against losses arising from the employer's negligence to an employe or the carrier's negligence to a passenger would be to overthrow the foundations upon which all insurance is built, whether indemnity, life, accident or fire. Negligence is bound up with or collaterally related to every form of insurance, and the interests of 'third persons' are involved in it all. Partial indemnity will produce neglect in one form as much as in another; and the encouragement to negligence on the part of the insured, because of that indemnity, does not invalidate any form of insurance. Courts ought not to base the law upon the theory that employers are controlled only by ignoble self-interest. A predisposition to fraud, neglect, or any form of wrongdoing, is never presumed by the law."

In **Stone v. Old Colony S. R. Co.**, 212 Mass., 459, it was said:

"* * * State legislation cannot deprive a citizen of the personal right to protect himself from loss through insurance obtained on his property under a contract made outside of the state of his domicil." (p. 464.)

In **Rumford Falls Co. v. F. & C. Co.**, 92 Me., 574, it was held:

"A policy issued by a casualty company against employers' liability is a contract of indemnity, in which the parties have a legal right to insert any stipulations and conditions which they deem reasonable and necessary, provided no principle of public policy is thereby contravened."

In **Hoadley v. Purifoy**, 107 Ala., 276, (30 L. R. A., 351), the court said:

"We do not doubt that an individual in this state may engage in and carry on a fire insurance business. There is nothing in such a contract that is unlawful or against public policy. This proposition requires neither argument nor authority to support it." (p. 291.)

As contracts indemnifying employers are not inimicial to public welfare, the legislature cannot prohibit such contracts. Upon this proposition we submit the following authorities:

In **Adams v. Tanner**, 244 U. S., 590, it was held that where there is nothing inherently immoral or dangerous in the business or the contracts in question, the legislature may regulate but cannot prohibit such business or contracts.

The 1917 amendments of Sections 1465-69 and 1465-101 did not regulate those engaged in the business of issuing employers' liability insurance. They repealed all laws regulating those engaged in issuing the insurance. They revoked all authority to engage in the business of issuing such insurance and, in their application to the employer, they absolutely prohibit him from making any contracts of indemnity or insurance.

In **Allgeyer v. Louisiana, supra**, the court recognized the right of the legislature to regulate "acts done within the state by an insurance company, or its agents, doing business therein," but having in mind the contracts of insurance which Allgeyer had made, and the statute of Louisiana attempting to penalize him for making such a contract, and Article XIV of the amendments to the Constitution, it was said that the liberty mentioned in that amendment embraces the right of the citizen "to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." (p. 589.)

In **Dobbins v. Los Angeles**, 195 U. S., 223, a gas plant was commenced by permit under a municipal ordinance fixing certain limits within which the gas works might be erected. Later the limits were changed so as to ex-

clude the location in which the gas works had been commenced. **Mr. Justice Day** said: "This action is strongly corroborative of the allegations of the bill that the purpose was not police regulation in the interest of the public but the destruction of the plaintiff's rights and the building up of another company," etc. (p. 239), and he stated, "but where the facts as to the situation and conditions are such as to establish the exercise of the police power in such manner as to oppress or discriminate against a class or an individual the courts may consider and give weight to such purpose in considering the validity of the ordinance," (p. 240) and it was held that the facts brought that case "within that class of cases wherein the court may restrain the arbitrary and discriminatory exercise of the police power which amounts to a taking of property without due process of law," etc. (p. 241.)

Yee Gee v. San Francisco, 235 Fed., 757-764:

> "Another principle involved in the exercise of the police power, which it is hardly necessary to state, is that a mere legislative declaration that a business or occupation, harmless and innocuous in itself, is inimical to the public interest, either as a whole or as to some feature of its conduct, cannot make it so, unless by reason of surrounding conditions the declaration can be said to accord with the fact as based upon common observation and human experience. The Legislature cannot by its mere **ipse dixit** make that a guilty thing which is intrinsically an innocent one. It would be idle, for instance, for the Legislature to declare that the occupation of farming or the work of the horticulturist was in its nature inimical to the public interest, and to undertake to regulate the hours of the day in which the work of those great industries should be prosecuted. Such an attempt would, under existing conditions, at least, be treated only with derision, as falling wholly without the bounds of reason, and as involving a mere arbitrary attempt to interfere with the liberty of the citizen. In other words, any attempt at police regulation which interferes with the individual in

> the conduct of an innocent and legitimate business must have an appreciable relation to some public evil justly to be apprehended, and be reasonably calculated to avoid such evil. Beyond that the Legislature may not go."

In **German Alliance Ins. Co. v. Kansas**, 233 U. S., 389, it was held that the state may fix the rates of fire insurance companies but it was recognized in the opinion of **Mr. Justice McKenna**, as well as in the dissenting opinion of **Mr. Justice Lamar**, that the right to make insurance contracts is one that cannot be prohibited, a majority of the court holding that fixing rates is merely a restraint exercised in the regulation of the personal right of dealing with property freely or engaging in what contracts one may choose and with whom and upon what terms one may choose. (See page 416.) We do not understand that the query, "How can it be said that the right to engage in the business is a natural one when it can be denied to individuals and permitted to corporations?", (p. 416), is intended to imply that because restraints have been placed upon the right to make insurance contracts it can no longer be said to be a natural right. We apprehend this query means that the right to make insurance is not a natural right in the sense that no restraints, by regulation, can be put upon it. It does not mean that such restraints may go to the extent of absolute prohibition of such contracts.

In **Chenoweth v. State Board, supra**, it was said:

> "The power of the legislature however, is not such as may unreasonably interfere with the undoubted right of every citizen to follow any lawful calling, business or profession, he may choose, subject only to reasonable regulation; for the right to labor and to receive the fruits of such labor is a natural and inherent right always protected by the constitution." (p. 77.)

And again:

> "The right to practice medicine in respect to its value is no different from the right to practice law, and of this Mr. Justice Field said, in **Ex parte Wall**, 107 U. S., 265, '* * * To disbar him having such a practice is equivalent to depriving him of this capital. It would often entail poverty upon himself, and destitution upon his family. Surely the tremendous power of inflicting such a punishment should never be permitted to be exercised unless absolutely necessary to protect the court and the public from one shown by the clearest legal proof to be unfit to be a member of an honorable profession." (p. 80.)

If it is within the power of the legislature of Ohio to interfere at all with the right of an employer to make contracts of employers' liability insurance, the interference can extend only to regulation and not to prohibition of such contracts. It is difficult to conceive of any business transaction or activity beyond the power of the legislature to regulate; therefore employers, in seeking indemnity for their liability to employes, may be regulated like doctors and lawyers, but the legislature has no more power to prohibit the employer seeking and obtaining and maintaining such indemnity than it has power to prohibit a doctor or lawyer practicing his profession.

The right of the employers involved in this case to make their contracts of indemnity must stand and the prohibitory acts of the legislature must fall. While insurance companies no longer have the right to issue such insurance in Ohio, these employers have the right to make contracts with each other, or with others. Even if they should make contracts with insurance companies outside of the state, or through the mails, their power to do so cannot be prohibited by the legislature. An injunction against the interference by the state with this power to make such contracts is sought by these employ-

ers in this case. They also seek an injunction against interference with the contracts with the insurance companies which they now have and which, by their own terms, are in full force, and which were made with insurance companies lawfully authorized so to do at the time the contracts were made.

In the opinion of the court, **Donahue, J.**, has said that the question in this case "is in every way analogous to the question arising in the case of **Louisville & Nashville Ry. Co. v. Mottley,** 219 U. S., 467, in which case it was held by the Supreme Court of the United States, that 'the power of congress to act in regard to matters delegated to it is not hampered by contracts made in regard to such matters by individuals, but contracts of that nature are made subject to the possibility that, even if valid when made, congress may exercise its power to render them invalid.'" (Rec., p. 50.)

Mottley and his wife had railway passes issued in settlement of a claim (p. 471). The act of congress in question prohibited all carriers receiving "a greater or less or different compensation" for transportation than that specified in the tariff filed and in effect at the time. (p. 473.) Honoring the passes would defeat the explicit purpose of the act and neutralize the purpose of the constitution in giving congress full and exclusive control of commerce between the states.

The Mottley case was followed in **P. B. & W. R. R. v. Schubert,** 224 U. S., 603. The second employers' liability act declared void all contracts, etc., which interfered with the liability created by the act. The contract in question provided that the benefits of the relief association should be in full of all liability.

In the Mottley case and in the Schubert case and in each of the cases cited in the opinion of the Supreme Court of Ohio, the act in question was either within the

police power or the interstate commerce power of the law-making body. The contract was in direct conflict with the act. Both could not exist, and, of course, the act prevailed.

The power to prohibit the carrying out of a pre-existing contract can only exist when the legislature had power to prohibit the act which the contract seeks to accomplish. If, for instance, the legislature should prohibit any person from having possession of intoxicating liquors, it could prohibit the insurance of such liquors, and it could annul all existing contracts providing such insurance. So, if it should prohibit lotteries, it could prohibit insurance of lottery paraphernalia and annul all existing contracts providing such insurance. These are instances, like the Mottley case, where the legislature may prohibit the act provided for in the contract. They recognize the distinction between acts which inherently may be immoral or dangerous and those which cannot be so regarded, a distinction recognized by **Mr. Chief Justice White** in **Wilson v. New**, 243 U. S., at page 347, where he said, "It is shown by the settled doctrine sustaining the right by regulation absolutely to prohibit lottery tickets and by the obvious consideration that such right to prohibit could not be applied to pig-iron, steel rails, or most of the vast body of commodities."

If the workmen's compensation law had been made compulsory, requiring all employers to pay into the state fund, it might be claimed that any prior or subsisting contract between employers and employes for direct payments of compensation must yield to the law; that as the contracts would be in conflict with the law and the law would be within the police power of the legislature, the law must prevail and the contracts must fail. Likewise, when the law established a scale of compensation to be paid to employes any prior and subsisting contract be-

tween employers and employes fixing a different scale of compensation must yield to the law. But it could be as well said that an employer may be prohibited from borrowing money to make his payments or accumulating a fund to meet them, as to say that he cannot by a contract of indemnity assure the payment to his employes, and at the same time safeguard his enterprise against a crushing calamity or a long series of serious accidents. There is a lack of any connection whatever between indemnity insurance and direct payment by employers to their employes.

Contracts indemnifying employers against their liability to employes are merely collateral to the obligation of the employers. They are not in conflict with that obligation. They are not only consistent with that obligation but in aid of it.

III.

ASSUMING, FOR THE PURPOSE OF THIS BRANCH OF THE ARGUMENT ONLY, THAT THE STATE FUND "INSURES" THE COMPENSATION DUE TO EMPLOYES FROM EMPLOYERS, AND, THAT THE LAW MAY GIVE THE STATE FUND A MONOPOLY OF SUCH INSURANCE AND DENY THE RIGHT TO ISSUE SUCH INSURANCE TO ALL OTHERS, STILL THE LAW CANNOT (1) ABROGATE EXISING INSURANCE, VALID WHEN IT WAS ISSUED, OR, (2) TAKE AWAY THE RIGHT OF THE EMPLOYER TO PROCURE OTHER INSURANCE BY MAKING CONTRACTS OF INSURANCE IN OTHER STATES, OR BY ANY OTHER MEANS OVER WHICH THE STATE HAS NO CONTROL.

(1). The State Cannot Abrogate Existing Insurance, Valid When it Was Issued.

It is admitted by the general demurrers of defendants that the insurance contracts mentioned in the pleadings were valid and existing when the acts in question were passed and when this suit was commenced.

The right to make insurance contracts is a natural right, subject, however, to the regulatory power of the state. This power to regulate may extend to prescribing the qualifications of those who may issue insurance. Therefore, the state may provide for the organization, or for admission into the state, of insurance corporations. It may prescribe the qualifications of such corporations. It may prohibit the issuance of insurance by other corporations and prohibit the issuance of insurance by individuals and thus effectuate a monopoly of the issuance

of insurance in the corporations organized under the prescribed qualifications and regulations.

Insurance, and those engaged in issuing it, have long been the subject of regulatory legislation in Ohio. Prior to such legislation individuals could, and did, engage in the business of issuing insurance. After the enactment of the laws providing for insurance corporations, fixing their qualifications and prohibiting the issuance of insurance except upon compliance with such laws, corporations not so complying and individuals could not lawfully issue insurance. It has never been supposed, however, that contracts of insurance made by individuals, or by corporations thereunto authorized at the time the contracts were made, became void upon the enactment of a law prescribing qualifications of the insurer, with which qualifications the insurer in the prior and subsisting contracts does not comply. It always has been supposed that such regulations prescribing qualifications of insurers effectually control future contracts, but do not apply to contracts already made. It never has been supposed that the law could apply regulations affecting the qualifications of insurers to existing contracts and it has been supposed that if the legislature should attempt to do so the attempt would be ineffectual.

Upon establishing regulations of insurance corporations, the law thereafter may modify them by imposing further qualifications. For instance it may require a capital of $200,000 instead of $100,000. It may require a deposit with the state when no deposit theretofore was required. It may give visitorial power to a state bureau and require a license by the bureau. All insurance corporations thereafter must comply with the new regulations and no insurance thereafter can be issued by them unless they do so comply. It has never been supposed, however, that a law imposing such new qualifications has the effect of abrogating existing contracts, valid when

made, but in which the insurer has not had, and does not have, the newly required qualifications. If such a law imposing new qualifications upon insurance corporations should also declare that all contracts theretofore made by insurers that have not possessed or complied with, and do not now possess or comply with the new qualifications and regulations, shall be void, can it be doubted that such attempted application of the new law to existing contracts is ineffectual?

The law may provide for incorporation and for admission into the state of insurance companies. Insurance companies may be organized or may enter the state under such laws and issue insurance, and the law thereafter may revoke the authority of all such companies and prohibit their operation in the state. But certainly it would not be held that such revocation affects contracts made by companies while thereunto authorized. If the law revoking the authority of such companies should further declare that all contracts theretofore issued by them shall be void, such provision of the law would be invalid.

The legislature may repeal all laws authorizing the operations of life insurance companies which have been, or now are issuing life insurance in the state, and may prohibit them from issuing insurance in the state. Such revocation of the authority of the insurer would not affect subsisting life insurance issued prior to the revocation. If such a law repealing and revoking the authority of such companies and prohibiting their future operation in the state, should further declare that all life insurance theretofore issued by such companies shall be void, any such attempted legislative prohibition or interference with existing life insurance would be invalid. If under such legislation and under a life insurance policy issued by such a company prior to the enactment of the law, the insured should die the day after the act is passed, clearly the insurance company could not de-

fend on the ground that the policy is void. So, with fire insurance, accident insurance, liability insurance and surety bonds, the same principle prevails, denying to the legislature the power to affect existing contracts under its power to regulate those engaged in the business of issuing insurance. That principle, while recognizing the power of the legislature to establish qualifications of the issuers of insurance, does not permit the legislature to abrogate or interfere with existing contracts of insurance which were valid when made.

If an employer has a policy issued by a corporation indemnifying him against his liability, a policy which was valid when made, and the law thereafter should provide that such contracts can be made only by corporations having qualifications not possessed by such corporation, the law cannot declare such existing policy void, on the theory that the issuer of the insurance does not comply with the new qualifications. The power to declare such preexisting contracts void is not involved in the power to regulate the qualifications of the insurer.

If the state fund is "insurance" of compensation, and if the law may give the Industrial Commission power to issue such insurance and deny to all others the right to issue such insurance, and if it may be said that such act of the legislature is under its power to regulate insurance and from time to time modify the qualifications of insurers of employer's liability, such substitution of the state for the insurance companies, theretofore qualified to make such insurance, is like the substitution of the insurance companies for individuals theretofore qualified to issue such insurance. Conceding for the moment that the state may grant to itself the monopoly of issuing insurance, yet it is like the monopoly the state heretofore granted the qualified insurance companies when it took the power away from individuals and when it took the

power away from companies which do not qualify. The law took the power to issue insurance away from individuals and gave it to corporations having certain qualifications. It increased the qualifications. But in all these successive acts regulating the qualifications of the insurer, the law did not and could not, interfere with existing contracts of insurance. And if the 1917 amendment to the compensation law could be considered as an act regulating the qualifications of the insurer, though it forbids and does not regulate insurance, still the law could no more interfere with existing contracts of insurance than it did, or could, under the preceding changes of regulations.

The state might engage in the business of life insurance. Assuming that the state could prohibit all others from issuing life insurance, certainly the state could not, in its attempted monopoly of life insurance, declare that all life insurance, theretofore issued shall be void, notwithstanding it was valid when issued. So, if the state should engage in the business of fire insurance and undertake to prohibit all others from issuing such insurance, it could not abrogate fire insurance contracts theretofore made by parties then duly authorized to make such contracts.

If the state should take upon itself the issuing of all insurance and prohibit all others issuing any insurance, it would not have the power to abrogate existing contracts of insurance, valid when made.

The point we here make, and have attempted to illustrate, is that the state may regulate the qualifications of insurers, but whether the progressive steps of regulation proceed from individual insurers to corporations or from corporation insurers having certain qualifications, to corporation insurers having enhanced qualifications, or whether it proceed from corporation insurers to state in-

surers, the law cannot prohibit existing contracts, valid when they were made.

Such attempted abrogation of existing insurance contracts cannot be justified upon the proposition that "if insurance is desired, the state will furnish it out of the fund created and maintained for that purpose," expressed by Judge Donahue. (Rec., p. 52). If that observation is sound it follows that the legislature has the power to abrogate all existing insurance whenever it changes the regulations, on the theory that those who desire insurance may procure it under the new regulations. The existing insurance may be of great value because of lower premiums or enhanced worth of the insurer's engagements under the contract, and many other appreciable considerations. All such rights would be sacrificed on the theory that the insurance procurable under the new regulations is a complete and identical substitute for the insurance abrogated.

In the progress of legislative regulation of insurance in Ohio, the law has never attempted to declare that existing insurance shall be void. There is little, if any, such legislation found in any regulatory laws of this or other states. Therefore we cannot find authorities dealing directly with the question whether the state under its power to regulate insurance may abrogate existing contracts. But the principle we urged has been recognized and sustained by the authorities, among which is **Bedford v. Eastern Building & Loan Ass'n**, 181 U. S., 227. Bedford, a resident of Tennessee, subscribed for stock of a New York Building and Loan Association and made his application for a loan in pursuance of by-laws of the association. After the application for the loan but before the loan was made, the Tennessee statute in question was enacted, requiring the association to make a deposit as a prerequisite to doing business in Tennessee.

After this statute was passed, the loan was made. It was held:

> "(1). That Bedford's subscription to the stock of the association, its issuance, and the application of (for) a loan in pursuance of it, constituted a contract, which is inviolable by the state legislature."
>
> "(2). That by his subscription to the stock of the association, Bedford became a member of it, bound to the performance of what its by-laws and charter required of him, and entitled to exact the performance of what the by-laws and charter required of the association.
>
> "This court recognizes the power of a State to impose conditions upon foreign corporations doing business within the State, but that cannot be exercised to discharge the citizens of the State from their contract obligations." (p. 228).

The **Supreme Court** of **Tennessee**, construing the same statute, had held in **New York Building & Loan Ass'n. v. Cannon**, 99 Tenn., 344:

> "* * * If we were to grant that the borrower had a vested right to the loan, and the association had a legal obligation to consummate it, still, it must follow that the contract could be entered into, and the loan and mortgage made, only in compliance with the law. There was nothing to prevent the association from complying with the statutes and thus placing itself in the attitude where it could legally make the loan and take the mortgage if it were under obligation to do so, as it claims." (pp. 347, 348).

But **Mr. Justice McKenna** said:

> "* * * It (the building and loan association) might indeed have the right to decline any condition and retire from the State, and from all it had the option to retire from. But it could not retire from the execution of its contracts. It contracted with Bedford to make him a loan if it had the means in its treasury and his security was good. The State could not affect that obligation nor impair it." (**Supra**, p. 241).

The view of the Supreme Court of Ohio in this case is analogous to that of the Supreme Court of Tennessee in the Bedford case. The Tennessee court held that the new statutory regulations applied to contracts made before the regulations were enacted. The Ohio court has held that the new regulations involved in this case apply to contracts made before the law was enacted.

American Building & Loan Ass'n. v. Rainbolt, 48 Nebr., 434, (67 N. W., 493), was an action to recover amounts paid on the capital of a building association, on the ground of fraud in securing the subscription for the stock. It was held:

> "* * * Had the act of 1891 in express terms declared nugatory and void all contracts of building and loan associations failing to conform to the conditions thereby imposed, it would, as to existing agreements, have been a clear invasion of constitutional rights as impairing contract obligations." (p. 450.)

In **McNamara v. Keene,** 98 N. Y. S., 860, the law under consideration was an amendment of the New York statute regulating foreign corporations. The amendment prohibited an assignee of a contract made by an unlicensed foreign corporation, from suing on the contract. The contract in question was assigned before the amendment was passed. It was held that the statute would not be construed as applicable to such contract, as it would impair its obligation by a "withdrawal of all remedy in our courts." (p. 861.)

In **Industrial Building & Loan Ass'n. v. Meyers,** 12 Ariz., 48, (95 Pac., 115), laws relating to foreign corporations doing business in the state were passed after the building and loan association had made a loan to Downs. It was held that the building association was not required to show compliance with the subsequently

enacted law as a prerequisite to enforcing its mortgage in a suit against Downs. The court said:

> "* * * To require it to comply with the provisions of the Statutes of 1901 as a condition to maintaining its action would impair the obligation of its contract. **Bedford v. Eastern Bldg. & Loan Ass'n**, 181 U. S., 227." (p. 55.)

(2). The State Cannot Take Away the Right of the Employer to Procure Other Insurance by Making Contracts of Insurance in Other States, or by any Other Means Over Which the State Has No Control.

Assuming that the legislature may proceed with the regulation of the qualifications of those engaged in the business of issuing insurance, even to the extent of providing for the state issuing the insurance and denying to all others the right to issue insurance, nevertheless it cannot deprive the employer of his right to seek and obtain insurance. The legislature may, and in Ohio it has, prohibited insurance companies from issuing, in the state, insurance indemnifying employers. An employer, however, has the right to make any such contract in another state. He may, through the mails or by other means of communication or transportation, make indemnifying contracts with insurance companies or others, in other states.

In **Stone v. Old Colony S. R. Co.**, 212 Mass., 459, it was held:

> "The provisions of St. 1894, c. 522, §3, now contained in St. 1907, c. 576, §3, that 'all contracts of insurance on property, lives or interests in this Commonwealth shall be deemed to be made therein,' is not to be interpreted as attempting to regulate or prohibit contracts made in other jurisdictions or to deprive a citizen of this Commonwealth of the right to protect himself from loss through a contract of insurance made in another State."

In **N. Y. Life Ins. Co. v. Dodge**, 246 U. S., 357, the statute of Missouri which was construed in **Burridge v. Ins. Co.**, 211 Mo., 158 **(infra)** was under consideration and this court held that the statute "cannot be extended so as to prevent the policyholder, while present in such State, and the company from making and carrying out a subsequent, independent agreement in the company's home State," etc.

Mr. Justice Peckham, in **Allgeyer v. Louisiana**, 165 U. S., 578, at pages 590, 591, said:

> "Has not a citizen of a State, under the provisions of the Federal Constitution above mentioned, a right to contract outside of the State for insurance on his property—a right of which state legislation cannot deprive him? We are not alluding to acts done within the State by an insurance company or its agents doing business therein, which are in violation of the state statutes."

The statute under consideration in the Allgeyer case provided that any person who does any act in the state to effect for himself, or for another, insurance on property in the state in any company which has not complied with the laws of the state, shall be subject to a fine. Recognizing the power of the legislature to regulate and prohibit insurance companies, the court held that it could not prohibit Allgeyer making contracts of insurance. If the legislature cannot, by direct prohibition, forbid a citizen making contracts of insurance, if it cannot punish him for so doing, it follows that it cannot compel him to abandon his right as a condition to enjoying a right enjoyed by all others. If the legislature of Louisiana could not, by direct prohibition, prevent Allgeyer from making a contract with a New York insurance company, how can the state of Ohio prevent an Ohio employer making a contract of indemnity wherever and with whomsoever he may find opportunity to do so, by refusing such employer the right to elect to pay compensation directly, which is enjoyed by all other employers in the state?

IV.

NEITHER SECTION 1465-69 NOR SECTION 1465-101, AS AMENDED IN 1917, WAS INTENDED TO APPLY, AND THEY DO NOT APPLY TO CONTRACTS THERETOFORE MADE BY EMPLOYERS.

If this court is to accept the retroactive construction given to these statutes by the Supreme Court of Ohio, then the foregoing proposition is not open to debate here. Otherwise we submit the following:

It is a settled rule that, if reasonably possible, statutes will be so construed as to avoid actual or doubtful conflict with the constitution. Such construction is more than possible here. It is the natural one as to both amendments. Construed as urged by the Industrial Commission, and as applied by the Supreme Court of Ohio, the amendments in question retroact and impair contract rights. Properly read they do not have this effect.

Sturges v. Carter, 114 U. S., 511:

> "Mr. Justice Storey's definition of a retrospective law in **Society for Propagating the Gospel v. Wheeler**, 2 Gall., 139, has been adopted by the Supreme Court of the State of Ohio, and is quoted and adopted by this court."

That definition is as follows:

> "Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." (p. 519.)

In **Bernier v. Becker**, 37 O. S., 72, a notary had taken an acknowledgment of a deed ten months after his commission had expired. The act of 1858 provided:

> "Any act done by a notary public subsequently to the expiration of his term of office shall be as valid as if done during his term of office." (p. 74.)

The court held that act not retroactive, stating:

> "It is laid down as a rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively. **Cooley's Cons. Lim.**, 370; **Broom's L. Maxims**, 35. This rule is applicable to the statute now in question." (p. 74.)

In **Kelley v. Kelso**, 5 O. S., 198, the court had under consideration an act of Congress to limit the liability of ship owners. It was claimed it had a retrospective operation. **Ranney, C. J.**, said:

> "* * * Irrespective of all constitutional restraints, it is not difficult to see that such legislation is utterly inconsistent with that jealous regard for private rights, for which our institutions have been distinguished; and, in the absence of clear and unmistakable language, it ought never to be imputed to a legislative body." (p. 201).

In both of the above cases the laws were in general terms and were declared to be prospective in operation only, because they did not contain express reference to past transactions.

In **State v. Creamer**, 85 O. S., 349, the Ohio workmen's compensation act of 1911 was under consideration, the same act which this court had under consideration in **Jeffrey Mfg. Co. v. Blagg**, 235 U. S., 571. **Johnson, J.**, said:

> "As to the suggestion that this statute impairs the obligations of contracts it is sufficient to say that it can of course not affect contracts in existence and unexpired at the time it is put into operation by the employer." (p. 405.)

In this observation evidently Judge Johnson intended to state that the law in question was not meant to, and does not, affect existing contracts, and not that the law in question could not affect such contracts. The law and the contracts in that case were within the rule of **L. & N. Ry. Co. v. Mottley, supra.**

In **Hathaway v. Mutual Life Ins. Co.**, 99 Fed., 534, the court had under consideration a New York statute relating to forfeiture of life insurance policies. **Hanford, J.**, said:

> "* * * but, to cut off existing rights, the act must contain explicit declarations of its purpose to cut them off, or its provisions must necessarily cut them, * * *"

and further,

> "The courts will not presume that a new statute was intended to cut off any existing right, when there is not express declaration of such intention, for the reason that it is contrary to the policy of our government to construe statutes so as to make them operate retroactively." (p. 537.)

In **Burridge v. New York Life Ins. Co.**, 211 Mo., 158, (109 S. W., 560), the law had provided that a life insurance company may deduct from the net value of a policy any indebtedness on account of premiums, before applying it to the purchase of temporary insurance. The amendment in question provided that such indebtedness for premiums, and also any other indebtedness to the company, may be deducted. It was held that the amendment to the act was not retrospective, so as to cover a policy theretofore issued, under the rule that an act must be construed as prospective unless its language calls for a retrospective operation. (p. 173).

Neither the amendment of Section 1465-69 nor the amendment of Section 1465-101 of 1917 declares that the prohibition shall extend to existing contracts.

Both amendments are framed in language referring to contracts to be made in the future, not contracts already made. Section 1465-101 provides; "all contracts and agreements shall be absolutely void * * * which undertake to indemnify * * * or which provide that the insurer shall pay * * * or by which it is agreed that the insurer shall pay any such damages." The prohibition is against contracts "which undertake to indemnify," not contracts which have undertaken to indemnify; to contracts "which provide that the insurer shall pay," not contracts which have so provided; to contracts "by which it is agreed that the insurer shall pay," not contracts by which it has been agreed that the insurer shall pay. The provision which relates to insurance companies is that no license to issue such policies "shall be granted or issued." All this language looks to the future and is applicable to the future, not to the past.

Likewise, the amendment of Section 1465-59 relates to employers "who do not desire to insure the payment thereof, or indemnify themselves against loss sustained by the direct payment thereof." The words "who do not desire," in their ordinary significance, apply to employers who in the future shall elect to pay compensation directly and shall then desire such indemnity, not to employers who heretofore have so elected and heretofore have indemnified themselves and thereby satisfied their desire. If the legislature had intended the amendment to apply to existing contracts of indemnity, the law would have contained express reference to employers who have made and maintain such contracts.

We submit that it clearly appears from the language of the amendment that they were intended to apply to future contracts only. But if it should be held that the language is ambiguous, still upon principle and the authorities the amendments must be held to apply to fu-

ture contracts only. They cannot have retroactive application "unless the legislature has so explicitly expressed its intention to make the act retrospective that there is no place for a reasonable doubt on the subject." **(Black's Constitutional Law,** 3rd Ed., Sec. 286), or in other words, "Unless the language employed in the enactment is so clear it will admit of no other construction * * *. It is always presumed that statutes were intended to act prospectively, and all doubts are resolved in favor of such a construction." **(Lewis' Sutherland Statutory Construction,** 2nd Ed., Sec. 642.)

THE PLAN OF WORKMEN'S COMPENSATION AS OPERATED BY THE STATE INDUSTRIAL COMMISSION UNDER THE LAW OF OHIO, IS NOT INSURANCE.

In the foregoing argument we have proceeded upon the assumption, for the purpose of the argument only, that in conducting the workmen's compensation fund the state provided "insurance" indemnifying the employer. We maintain, however, that the state does not "insure" the employer and does not "indemnify" him against his liability.

It may be well to examine into the situation of employers under the Ohio workmen's compensation law, with respect to their liability to employes.

Status of the Employer Who Elects to Pay Compensation Directly.

The employer who elects to pay compensation directly is liable to his employes and their dependents, in case of injury or death, in the several amounts of compensation fixed by the law, provided that the employe or his dependents, after the injury or death occurs, may choose

to accept the limited amount of compensation; or, to state it in another way, the employer is not liable for the compensation unless the employe or his dependents, after the injury or death occurs, may choose to accept compensation. (Sec. 1465-76, Appendix, p. 79.) The employe or his dependents may sue for damages, in which event no limit is placed upon the amount of recovery. If the employe claims compensation, he waives his right to sue for damages. If he sues for damages, he waives his right to claim compensation, and the suit for damages is for the wilful act of the employer, or any of his officers or agents, or the failure of the employer, or any of his officers or agents, to comply with any lawful requirement for the protection of the lives and safety of employes.

To show the extent of the employer's liability in such a suit, and to compare the risk and danger of the employer's liability in such a suit with his liability for damages before the workmen's compensation law was passed, it is well to examine the laws of Ohio containing the many and comprehensive requirements for the employes' safety established by the law, and to understand the authority of the Commission to establish such requirements. In addition to the many detailed, specific requirements in Sections 1027, 1028-1-2 and in Sections 1018 to 1026, Sections 871-15-16 require an employer to furnish employment which shall be safe for the employes and furnish a place of employment which shall be safe, and safety devices, safe-guards, methods and processes, etc., reasonably adequate to render the employment and place of employment safe, and do every other thing reasonably necessary to protect the life, health, safety and welfare of employes, and forbid an employer to require or permit an employe to go or be in any employment or place which is not safe. Section 871-25 provides that all

orders of the Industrial Commission in conformity with law, shall be in force and be **prima facie**, reasonable and lawful until found otherwise in an action brought for that purpose. Section 871-21 vests the Commission with power to have such supervision of every employment and place of employment, as may be necessary to enforce and administer all laws and all lawful orders requiring such employment and place of employment to be safe, and requiring protection of the life, health, safety and welfare of employes. Section 871-43 penalizes an employer who shall fail to perform any duty prescribed by the Commission, or fails to obey any order made by the Commission. In **American Woodenware Mfg. Co. v. Schorling**, 96 O. S., 365, the court held that an order made by the Commission, to employers generally, or to a particular employer, with reference to safe employment or place of employment, is a lawful requirement, for failure to comply with which, or with any statute or municipal ordinance prescribing means to protect employes, the employer is liable to an employe injured by reason of such failure. To the same effect is **Variety Iron & Steel Works v. Peak**, 89 O. S., 267, which case arose before the compensation act was passed; followed and approved in **Acklin Stamping Co. v. Kutz**, 98 O. S., 61, 70. Section 871-13, paragraph 11, defines the terms "safe" and "safety" as meaning such freedom from danger as the nature of the employment will reasonably permit.

In view of the requirements imposed by the legislature and the authority of the Commission to make further requirements, it is apparent that those requirements cover all the duties which were imposed by statute and by the common law upon the employer before the enactment of the workmen's compensation law. His liability for his own and his officers' and agents' neglect to perform any of these manifold duties, and his liability for

the wilful act of all his officers and agents (commonly called "open liability"), indicate the risk of the employer to the danger of such suits which may involve an amount of liability disastrous to his enterprise.

Status of the Employer Who Elects to Contribute to the State Fund.

The employer who elects to contribute to the state compensation fund is liable for such amounts of contributions to the fund as the Commission, from time to time, may determine and assess upon him. (Sec. 1465-69.) The state fund is not liable for compensation to employes of such employer unless the employe, or his dependents, after the injury or death has occurred, shall choose to accept the limited amount of compensation. The employer who pays into the state fund is liable to a suit for damages precisely the same as the employer who elects to pay compensation directly. Each is allowed to plead contributory negligence and the fellow servant rule. (Section 1465-76.)

Having indicated the liability of both classes of employers, what risk do employers of each class who are operating an industry incur? Whatever the risks are, they are incident to the business in which the employer is engaged. They are risks against which the employer has a right to completely insure. The purpose of all insurance is to provide by comparatively small periodical payments, the spreading of the costs of a loss, injury or catastrophe among many. The employer who elects to pay compensation directly has the right to seek and procure a single contract of insurance indemnifying him against all his liability to his employes, a contract under which the insurer agrees to pay the loss whether it be in the form of compensation chosen by the employe or of a judgment for damages for an employe who chooses

to sue. An employer who elects to contribute to the state fund has a right to procure a contract indemnifying him against his liability to his employes and also covering his liability for the uncertain amounts which the State Commission may assess against him. In either case such a contract would be complete indemnity. Such a contract would be "insurance," and the right to make such a contract is a right which cannot be prohibited by the legislature.

The constitution guarantees the employe's right to sue for damages for injuries arising from the employer's failure to comply with lawful safety regulations. The constitution prohibits the legislature from taking away this right. The legislature has not attempted absolutely to take away this right. But it has deprived the employe who sues for damages of other rights to which he is entitled. It deprives him of his right to workmen's compensation. It makes no provision for payment or security for the damages the employe may recover. It prohibits the employe making any contract of employment with the employer, providing for insurance of the damages the employe may recover in the suit which the constitution guarantees and declares shall not be taken away from him. The employe has a right to make a contract with the employer requiring the employer to provide for insurance, not only of compensation, but also of the employer's liability for damages.

How can it be, as was said by the Supreme Court of Ohio (Rec., p. 52), "if insurance is desired, the state will furnish it," when the state gives no insurance and no protection whatever to the employer or employe, when the employe, exercising his lawful right, over which the state has no control, sues the employer for damages? The employer who elects to contribute to the fund cannot pay his money and fix his choice of limited compensa-

tion on the employe. He pays his money and the employe, or his dependent, after the injury or death, take **their** choice of limited compensation or suit for unlimited damages. Under no possible torturing of the term can the scheme of the state be characterized as insurance.

When an employer makes a contract of insurance he thereby relieves himself and makes the insuring party responsible for his obligation. He is not insured until some other party has agreed to pay his obligations or to indemnify him against loss by reason of his own payments. The state does not insure. It does not indemnify. The state does not guarantee. It does not bind itself or any other party to pay compensation to an employe who chooses to accept it. It is true that Section 1465-53 directs the Commission to fix rates sufficiently large to provide an adequate fund for the compensation, but the state is not responsible and no one else is responsible if a sufficient fund is not established.

While insurance companies can no longer issue employers' liability insurance in Ohio, the employers in this case, who heretofore have elected to pay compensation directly, maintain their right to procure insurance with whomsoever and wheresoever they may find opportunity to make contracts completely indemnifying them against their liability. They may, by co-operation with each other, establish their own fund and thereby spread over all the loss incident to a disastrous liability of one of them. While insurance companies cannot issue policies to them in Ohio, they may make such contracts with individuals in Ohio, who, since the repeal of all regulations, are restored to their natural right to make insurance contracts; and as the legislature cannot forbid this right to make such contracts, it cannot destroy the contracts which these employers made with an insurance company prior to the enactment of the law, which have

not expired and which were valid and which the insurance company had the authority, under the law, to issue at the time the contract was made.

Insurance is absolutely indispensable in the promotion and maintenance of the extensive and complex industrial and commercial enterprises of the day. As said by **Mr. Justice McKenna** in **German Alliance Ins. Co. v. Kansas,** 233 U. S., at page 414: "It is practically a necessity to business activity and enterprise."

This is certainly true of employers' liability insurance. A single catastrophe might entail such injuries and deaths and consequent damages as to ruin the employer. He not only has a right to procure insurance indemnifying him against such losses, but the preservation of that right is a necessity in industrial and commercial affairs. That right and the preservation of it must extend to insurance against all such losses whether they arise from the employe's negligence or the employer's negligence, the failure of the employer's servants to comply with lawful regulations or even their wilful acts.

Realizing the indispensability, not only to the employer but to the public, of complete insurance against such disasters, how can the state be heard to say that it may deprive the employer of his right to this complete protection because it has provided for a fund which may be insurance in case the employe or his dependents, after the injury or death, may choose to accept the limited amounts offered out of the fund, but is not insurance if the employe or his dependents do not so choose.

Respectfully submitted,

JUDSON HARMON,

A. I. VORYS,

Attorneys for Frank C. Thornton and The Cleveland Stamping and Tool Company.

APPENDIX.

Constitution of the State of Ohio, as amended 1912, Article II, Section 35:

Sec. 35. For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom, and taking away any or all rights of action or defenses from employes and employers; but no right of action shall be taken away from any employe when the injury, disease or death arises from failure of the employer to comply with any lawful requirement for the protection of the lives, health and safety of employes. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto.

Section 1465-61, General Code of Ohio, as amended March 20, 1917, 107 Ohio Laws, 157, 159:

Sec. 1465-61. The terms "employe," "workman" and "operative" as used in this act, shall be construed to mean:

1. Every person in the service of the state, or of any county, city, township, incorporated village or school district therein, including regular members of lawfully constituted police and fire departments of cities and villages, under any appointment or contract of hire, express or implied, oral or written, except any official of the state,

or of any county, city, township, incorporated village or school district therein. Provided that nothing in this act shall apply to policemen or firemen in cities where policemen's and firemen's pension funds are now or hereafter may be established and maintained by municipal authority under existing laws.

2. Every person in the service of any person, firm or private corporation, including any public service corporation employing five or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens, and also including minors who are legally permitted to work for hire under the laws of the state, but not including any person whose employment is but casual and not in the usual course of trade, business, profession or occupation of his employer.

3. Every person in the service of any independent contractor or sub-contractor who has failed to pay into the state insurance fund the amount of premium determined and fixed by the industrial commission of Ohio for his employment or occupation, or to elect to pay compensation direct to his injured and to the dependents of his killed employes, as provided in section 1465-69, General Code, shall be considered as the employe of the person who has entered into a contract, whether written or verbal, with such independent contractor unless such employes, or their legal representatives or beneficiaries elect, after injury or death, to regard such independent contractor as the employer.

Section 1465-68, General Code of Ohio (Sec. 21, Act of 1913, 103 Ohio Laws, 72, 79.)

Section 21. Every employe mentioned in subdivision one of section fourteen hereof, who is injured, and the dependents of such as are killed in the course of employ-

ment, wheresoever such injury has occurred, provided the same was not purposely self-inflicted, on or after January 1st, 1914, shall be paid such compensation out of the state insurance fund for the loss sustained on account of such injury or death as is provided in the case of other injured or killed employes, and shall be entitled to receive such medical, nurse and hospital services and medicines, and such amount of funeral expenses as are payable in the case of other injured or killed employes.

Every employe mentioned in subdivision two of section fourteen hereof, who is injured, and the dependents of such as are killed in the course of employment, wheresoever such injury has occurred, provided the same was not purposely self-inflicted, on and after January 1st, 1914, shall be entitled to receive, either directly from his employer as provided in section twenty-two hereof, or from the state insurance fund, such compensation for loss sustained on account of such injury or death, and such medical, nurse and hospital services and medicines, and such amount of funeral expenses in case of death as is provided by sections thirty-two to forty inclusive of the act.

Section 1465-69, General Code of Ohio (Sec. 22, Act of 1913, 103 Ohio Laws, 72, 79).

Section 22. Except as hereinafter provided, every employer mentioned in subdivision two of section thirteen hereof shall, in the month of January, 1914, and semi-annually thereafter, pay into the state insurance fund the amount of premium determined and fixed by the state liability board of awards for the employment or occupation of such employer the amount of which premium to be so paid by each such employer to be determined by the classifications, rules and rates made and published by the board; and such employer shall semi-annually thereafter pay such further sum of money into the state

insurance fund as may be ascertained to be due from him by applying the rules of the board, and a receipt or certificate certifying that such payment has been made shall immediately be mailed to such employer by the state liability board of awards, which receipt or certificate, attested by the seal of the board shall be prima facie evidence of the payment of such premium.

Provided, however, that as to all employers who are subscribers to the state insurance fund at the time of the taking effect of this act, or who may before January 1st, 1914, elect to become subscribers thereto, the foregoing provisions for the payment of such premiums in the month of January, 1914, and semi-annually thereafter shall not apply, but such subsequent semi-annual premiums shall be paid by such employers from time to time upon the expiration of the respective periods for which payments into the fund have been made by them. And provided further, that such employers who will abide by the rules of the state liability board of awards and as may be of sufficient financial ability or credit to render certain the payment of compensation to injured employes or to the dependents of killed employes, and the furnishing of medical, surgical, nursing and hospital attention and services and medicines, and funeral expenses equal to or greater than is provided for in this act, or such employers as maintain benefit funds or departments or jointly with other employers maintain mutual associations of such said financial ability or credit, to which their employes are not required or permitted directly or indirectly to contribute, providing for the payment of such compensation and the furnishing of such medical, surgical, nursing and hospital services and attention and funeral expenses, may, upon a finding of such facts by the state liability board of awards elect to pay individually or from

such benefit fund department or association such compensation, and furnish such medical, surgical, nursing and hospital services and attention and funeral expenses directly to such injured or the dependents of such killed employes; and the state liability board of awards may require such security or bond from said employers as it may deem proper, adequate and sufficient to compel, or secure to such injured employes, or to the dependents of such employes as may be killed, the payment of the compensation and expenses herein provided for, which shall in no event be less than that paid or furnished out of the state insurance fund, in similar cases, to injured employes or to the dependents of killed employes, whose employers contribute to said fund; and said board shall make and publish rules and regulations governing the mode and manner of making application and the nature and extent of the proof required to justify such finding of facts by the board as to permit such election by such employers, which rules and regulations shall be general in their applications, one of which rules shall provide that all employers electing directly to compensate their injured and the dependents of their killed employes as hereinbefore provided, shall pay into the state insurance fund such amount or amounts as are required to be credited to the surplus in paragraph two of section seven hereof.

The state liability board of awards may at any time change or modify its finding of facts herein provided for, if in its judgment such action is necessary or desirable to secure or assure a strict compliance with all the provisions of this act in reference to the payment of compensation and the furnishing of medical, nurse, and hospital services and medicines and funeral expenses to injured and the dependents of killed employes.

Section 1465-69, General Code of Ohio, as amended March 20, 1917 (107 Ohio Laws, 157, 159).

Sec. 1465-69. Except as hereinafter provided, every employer mentioned in subdivision two or (of) section 1465-60, General Code, shall, in the month of January, 1914, and semi-annually thereafter, pay into the state insurance fund the amount of premium determined and fixed by the industrial commission of Ohio for the employment or occupation of such employer the amount of which premium to be so paid by each such employer to be determined by the classifications, rules and rates made and published by said commission; and such employer shall semi-annually thereafter pay such further sum of money into the state insurance fund as may be ascertained to be due from him by applying the rules of said commission, and a receipt or certificate certifying that such payment has been made shall immediately be mailed to such employer by the industrial commission of Ohio, which receipt or certificate, attested by the seal of said commission shall be prima facie evidence of the payment of such premium.

Provided, however, that as to all employers who were subscribers to the state insurance fund prior to January 1st, 1914, or who may first become subscribers to said fund in any other months of January or July, the foregoing provisions for the payment of such premiums in the month of January, 1914, and semi-annually thereafter shall not apply, but such semi-annual premiums shall be paid by such employers from time to time upon the expiration of the respective periods for which payments into the fund have been made by them. And provided further, that such employers who will abide by the rules of the industrial commission of Ohio and as may be of sufficient financial ability to render certain the payment of compensation to injured employes or to the de-

pendents of killed employes, and the furnishing of medical, surgical, nursing and hospital attention and services and medicines, and funeral expenses equal to or greater than is provided for in sections 1465-78 to 1465-89, General Code, and who do not desire to insure the payment thereof or indemnify themselves against loss sustained by the direct payment thereof, may, upon a finding of such fact by the industrial commission of Ohio, elect to pay individually such compensation, and furnish such medical, surgical, nursing and hospital services and attention and funeral expenses directly to such injured or the dependents of such killed employes; and the industrial commission of Ohio may require such security or bond from said employers as it may deem proper, adequate and sufficient to compel, or secure to such injured employes, or to the dependents of such employes as may be killed, the payment of the compensation and expenses herein provided for, which shall in no event be less than that paid or furnished out of the state insurance fund, in similar cases, to injured employes or to dependents of killed employes, whose employers contribute to said fund; and should municipal or other bonds be accepted by said commission as security for said payments, such bonds shall be deposited with the treasurer of state whose duty it shall be to have custody thereof and to retain the same in his possession according to the conditions prescribed by the order of said commission accepting the same as security, and said treasurer shall retain possession of said bonds until such time as he may be directed by said commission as to the mode and manner of his disposition of the same; and said commission shall make and publish rules and regulations governing the mode and manner of making application and the nature and extent of the proof required to justify such finding of fact by said commission as to permit such elec-

tion by such employers, which rules and regulations shall be general in their application, one of which rules shall provide that all employers, electing directly to compensate their injured and the dependents of their killed employes as hereinbefore provided, shall pay into the state insurance fund such amount or amounts as are required to be credited to the surplus in paragraph two of section 1465-54, General Code. The industrial commission of Ohio may at any time change or modify its findings of fact herein provided for, if in its judgment such action is necessary or desirable to secure or assure a strict compliance with all of the provisions of the law in reference to the payment of compensation and the furnishing of medical, nurse, and hospital services and medicines and funeral expenses to injured and the dependents of killed employes.

Section 1465-72, General Code of Ohio, (Sec. 25, Act of 1913, 103 Ohio Laws, 72, 82).

Section 25. The state liability board of awards shall disburse the state insurance fund to such employes of employers as have paid into said fund the premiums applicable to the classes to which they belong, who have been injured in the course of their employment, wheresoever such injuries have occurred, and which have not been purposely self-inflicted, or to their dependents in case death has ensued. All employers electing directly to compensate their injured employes, in compliance with this act, shall pay to such injured employes, or to the dependents of employes who have been killed in the course of their employment, unless such injury or death of such employe has been purposely self-inflicted, the compensation, and shall furnish such medical, surgical, nurse and hospital care and attention or funeral expenses as would have been paid and furnished by virtue of this

act under a similar state of facts, by the state liability board of awards out of the state insurance fund, in case said employer had paid the premium provided by this act, into said fund.

Provided, however, that if any rule or regulation of such employer so directly compensating his employes, shall provide for or authorize the payment of greater compensation or more complete or extended medical care, nursing, surgical and hospital attention or funeral expenses to such injured employes, or to the dependents of such employes as may be killed, such employer shall be required to pay to such employes, or to the dependents of such as are killed, the amount of compensation and furnish such medical care, nursing, surgical and hospital attention or funeral expenses provided by his said rules and regulations.

And such payment or payments to such injured employes, or to their dependents in case death has ensued, shall be in lieu of any and all rights of action whatsoever against the employer of such injured or killed employes.

Section 1465-74, General Code of Ohio, (Sec. 27, Act of 1913, 103 Ohio Laws, 72, 82).

Section 27. Any employe whose employer has failed to comply with the provisions of section twenty-two hereof, who has been injured in the course of his employment, wheresoever such injury has occurred, and which was not purposely self-inflicted, or his dependents in case death has ensued, may, in lieu of proceeding against his employer by civil action in the courts, as provided in the last preceding section, file his application with the state liability board of awards for compensation in accordance with the terms of this act, and the board shall hear and determine such application for compensation in like

manner as in other claims before the board; and the amount of the compensation which said board may ascertain and determine to be due to such injured employe, or to his dependents in case death has ensued, shall be paid by such employer to the person entitled thereto within ten days after receiving notice of the amount thereof as fixed and determined by the board; and in the event of the failure, neglect or refusal of the employer to pay such compensation to the person entitled thereto, within said period of ten days, the same shall constitute a liquidated claim for damages against such employer in the amount so ascertained and fixed by the board, which with an added penalty of fifty per centum, may be recovered in an action in the name of the state for the benefit of the person or persons entitled to the same. And any employe whose employer has elected to pay compensation to his injured, or to the dependents of his killed employes in accordance with the provisions of section twenty-two hereof, may, in the event of the failure of his employer to so pay such compensation or furnish such medical, surgical, nursing and hospital services and attention or funeral expenses, file his application with the state liability board of awards for the purpose of having the amount of such compensation and such medical, surgical, nursing and hospital services and attention or funeral expenses determined; and thereupon like proceedings shall be had before the board and with like effect as hereinbefore provided.

And the state liability board of awards shall adopt and publish rules and regulations governing the procedure before the board provided in this section, and shall prescribe forms of notices and the mode and manner of serving the same in all claims for compensation arising under this section. Any suit, action or proceeding brought against any employer under the provisions of

this section, may be compromised by the board, or such suit, action or proceeding may be prosecuted to final judgment as in the discretion of the board may best subserve the interests of the persons entitled to receive such compensation.

Section 1465-76, General Code of Ohio, as amended February 6, 1914, (104 Ohio Laws, 193, 194).

Sec. 29. But where a personal injury is suffered by an employee, or where death results to an employee from personal injury while in the employ of an employer in the course of employment, and such employer has paid into the state insurance fund the premium provided for in this act, or is authorized directly to compensate such employee or dependents by virtue of compliance with section 22 of this act, and in case such injury has arisen from the wilful act of such employer or any of such employer's officers or agents, or from the failure of such employer or any of such employer's officers or agents to comply with any lawful requirement for the protection of the lives and safety of employees, then in such event, nothing in this act contained shall affect the civil liability of such employer, but such injured employee, or his legal representative in case death results from the injury, may, at his option, either claim compensation under this act or institute proceedings in the courts for his damage on account of such injury; and such employer shall not be liable for any injury to any employee or his legal representative in case death results, except as provided in this section; and in all actions authorized by this section, the defendant shall be entitled to plead the defense of contributory negligence and the defense of the fellow servant rule; and, in all cases determined in court as authorized by this section, when a judgment is awarded the plaintiff, the court shall determine, fix and award the

amount of fee or fees to be paid plaintiff's attorney or attorneys, any contract to the contrary notwithstanding.

Every employee, or his legal representative in case death results, who makes application for an award, or accepts compensation from an employer who elects, under section 22 of this act, directly to pay such compensation waives his right to exercise his option to institute proceedings in any court, except as provided in section 43 hereof. Every employee, or his legal representative in case death results, who exercises his option to institute proceedings in court, as provided in this section, waives his right to any award, or direct payment of compensation from his employer under section 22 hereof, as provided in this act.

The term "wilful act," as employed in this section, shall be construed to mean an act done knowingly and purposely with the direct object of injuring another.

Section 1465-90, General Code of Ohio, as amended March 20, 1917, (107 Ohio Laws, 157, 162).

Sec. 1465-90. The commission shall have full power and authority to hear and determine all questions within its jurisdiction, and its decision thereon shall be final. Provided, however, in case the final action of such commission denies the right of the claimant to participate at all or to continue to participate in such fund on the ground that the injury was self-inflicted or on the ground that the accident did not arise in the course of employment, or upon any other ground going to the basis of the claimant's right, then the claimant, within thirty (30) days after the notice of the final action of such commission, may, by filing his appeal in the common pleas court of the county wherein the injury was inflicted, be entitled to a trial in the ordinary way, and be entitled to a jury if he demands it. In such a proceeding, the prosecuting

attorney of the county, without additional compensation, shall represent the industrial commission of Ohio, and he shall be notified by the clerk forthwith of the filing of such appeal. Within thirty days after filing his appeal, the appellant shall file a petition in the ordinary form against such commission as defendant, and further pleadings shall be had in said cause, according to the rules of civil procedure, and the court, or the jury, under the instructions of the court, if a jury is demanded, shall determine the right of the claimant; and if they determine the right in his favor, shall fix his compensation within the limits under the rules prescribed in this act; and any final judgment so obtained shall be paid by the industrial commission of Ohio out of the state insurance fund in the same manner as such awards are paid by such commission. In claims for compensation, medical, hospital and nursing services and medicines and funeral expenses brought before said commission, by an injured employe or by his dependents in the event of his death as the result of injury sustained in the course of employment, in which said commission denies the right of claimant or claimants to receive or to continue to receive compensation from an employer who has duly elected to pay compensation, medical, hospital and nursing services, and medicines and funeral expenses direct to his injured and the dependents of his killed employes on the ground that the injury was self-inflicted, or, on the ground that the injury did not arise in the course of employment, or upon any other ground going to the basis of the claimant's right, the claimant or claimants shall have the right to appeal to the common pleas court of the county wherein the injury was inflicted, in the same manner as in claims against the state insurance fund and as heretofore prescribed in this section, except that the employer shall be the defendant in such proceedings; and if a verdict is ren-

dered in favor of the claimant or claimants, compensation shall be fixed within the limits under the rules prescribed in this act; and any final judgment so obtained shall be paid by the employer. Such judgment shall have the same preference against the assets of the employer in favor of the claimant or claimants as is now, or may hereafter be, allowed by law on judgment rendered for claims for taxes. Any claims for compensation, medical, hospital and nursing services, and medicines and funeral expenses brought before said commission by an injured employe, or by his dependents in the event of his death as a result of injury sustained in the course of employment in which said commission denies the right of claimant or claimants to receive or to continue to receive compensation from an employer who has failed or neglected, either to contribute to the state insurance fund or to elect to pay compensation, medical, hospital or nursing services, and medicines and funeral expenses direct to his injured, or the dependents of his killed employes, on the ground that the injury was self-inflicted, or on the ground that the injury did not arise in the course of employment, or upon any other ground going to the basis of the claimant's right, the claimant or claimants have the right to appeal to the common pleas court of the county wherein the injury was inflicted, in the same manner as in claims against the state insurance fund and as heretofore prescribed in this section; except that the employer shall be the defendant in such proceedings; and if a verdict is rendered in favor of the claimant or claimants, compensation shall be fixed within the limits under the rules prescribed in this act; and any final judgment so obtained shall be paid by the employer. Such judgment shall have the same preference against the assets of the employer in favor of the claimant or claimants as is now, or may hereafter be, allowed by

law on judgment rendered for taxes. The cost of such proceeding, including a reasonable attorney's fee to the claimant's attorney to be fixed by the trial judge, shall be taxed against the unsuccessful party. Either party shall have the right to prosecute error as in the ordinary civil cases.

Section 1465-101, General Code of Ohio (Sec. 54, Act of 1913, 103 Ohio Laws, 72, 91).

Section 54. All contracts or agreements entered into by any employer, the purpose of which is to indemnify him from loss or damage on account of the injury of such employe by accidental means or on account of the negligence of such employer or such employer's officer, agent or servant, shall be absolutely void, unless such contract or agreement shall specifically provide for the payment to such injured employe of such amounts for medical, nurse and hospital services and medicines, and such compensation as is provided by this act for injured employes; and in the event of death shall pay such amounts as are herein provided for funeral expenses and for compensation to the dependents or those partially dependent upon such employe; and no such contract shall agree, or be construed to agree, to indemnify such employer, other than hereinbefore designated, for any civil liability for which he may be liable on account of the injury to his employe by the wilful act of such employer, or any of such employer's officers or agents, or the failure of such employer, his officers or agents, to observe any lawful requirement for the safety of employes.

Section 1465-101, General Code of Ohio, as amended February 16, 1917, (107 Ohio Laws, 6).

Sec. 1465-101. All contracts and agreements shall be absolutely void and of no effect which undertake to indemnify or insure an employer against loss or liability

for the payment of compensation to workmen or their dependents, for death, injury or occupational disease occasioned in the course of such workmen's employment, or which provide that the insurer shall pay such compensation, or which indemnify the employer against damages when the injury, disease or death arises from the failure to comply with any lawful requirement for the protection of the lives, health and safety of employes, or when the same is occasioned by the wilful act of the employer or any of his officers or agents, or by which it is agreed that the insurer shall pay any such damages. No license or authority to enter into any such agreements or issue any such policies of insurance shall be granted or issued by any public authority.

APR 22 1920
JAMES D. MAHER,
CLERK

Supreme Court of the United States

No. [redacted]3[redacted]76

FRANK C. THORNTON AND THE CLEVELAND STAMPING AND TOOL COMPANY,
Plaintiffs in Error,

vs.

THOMAS J. DUFFY AND HERBERT L. ELIOT, MEMBERS OF AND COMPOSING THE INDUSTRIAL COMMISSION OF OHIO,
Defendants in Error.

Error to the Supreme Court of the State of Ohio.

BRIEF AND ARGUMENT IN REPLY TO BRIEFS AND ARGUMENTS OF THE ATTORNEY GENERAL AND OF MR. HOGAN.

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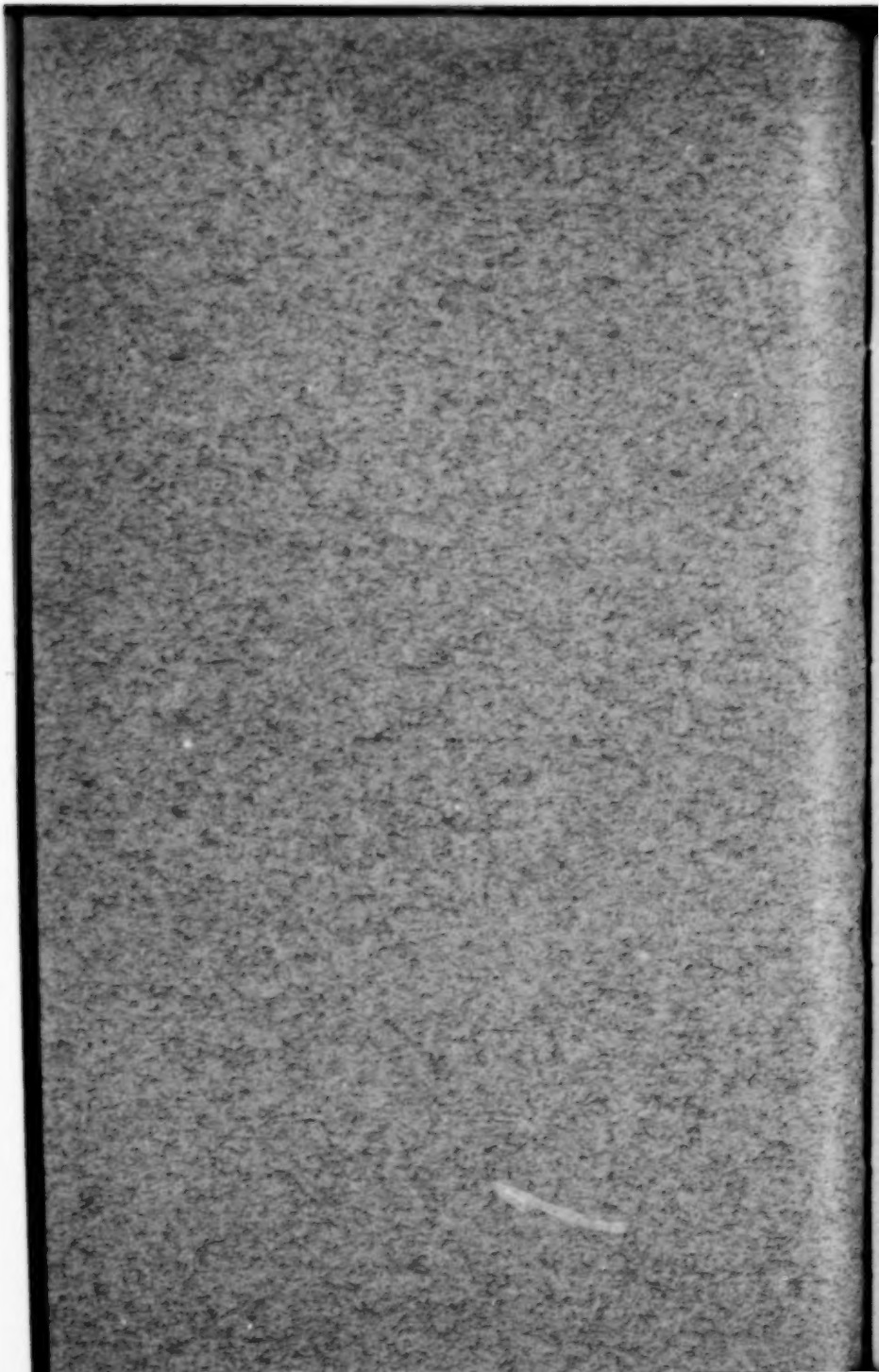

Supreme Court of the United States

No. 920.

FRANK C. THORNTON AND THE CLEVELAND STAMPING AND TOOL COMPANY,
Plaintiffs in Error,

vs.

THOMAS J. DUFFY AND HERBERT L. ELIOT, MEMBERS OF AND COMPOSING THE INDUSTRIAL COMMISSION OF OHIO,
Defendants in Error.

Error to the Supreme Court of the State of Ohio.

BRIEF AND ARGUMENT IN REPLY TO BRIEFS AND ARGUMENTS OF THE ATTORNEY GENERAL AND OF MR. HOGAN.

I.

The Attorney General entirely misapprehends our position when he states that our grievance is against the Constitutional Amendment of 1912. (p. 12.)

The constitutional amendment did not take away from employers the right of compensating directly or the right to insure their liability to employes. That amendment simply authorized the legislature to establish a state fund as a means of providing compensation. The legislature provided that as one means, and provided for the

employer paying compensation directly to employes as another means of workmen's compensation.

In making his election to pay into the state fund or to pay compensation directly the employer chooses one of these means of discharging a duty to his employes. In choosing to pay compensation directly he does not, as the Attorney General states, accept a "privilege." He assumes a duty.

The Attorney General, assuming that the choice of paying compensation directly is a "privilege," contends that any conditions to such choice may be imposed by the law, and that the court has no jurisdiction to inquire and determine whether the conditions are arbitrary and have no reasonable relation to the object sought to be accomplished. The law in question requires, as a condition to the choice of paying compensation directly, that the employer shall not desire to insure the payments. The Attorney General maintains that the court cannot consider whether the desire to insure cannot possibly interfere with or detract from the employer's liability to his employes. This proposition would sustain any conditions upon the right of such a choice; as, for instance, if it were limited to those who do not desire to vote for prohibition or female suffrage, or who live in Cleveland or Cincinnati. These fantastic illustrations serve to demonstrate that this constitutional amendment and this law could not take, and therefore have not taken, such form as to preclude the court from determining that inasmuch as the law cannot prohibit insurance it cannot compel a waiver of the right to insurance as a condition to the right, which otherwise all may have, to pay compensation directly.

The Attorney General maintains that contribution to the state fund is a burden and when the law allows an employer to pay compensation directly it thereby relieves him of the burden, and the employer cannot be heard to

complain of any conditions imposed upon his escape from the burden.

The range of duties which the state may impose upon its citizens by regulations is practically unlimited, but the state cannot exact any conditions it chooses to relieve from the duties it may impose, upon the Attorney General's principle that "instead of denying the whole loaf it accords them the one-half" (p. 16). The state cannot provide for two modes of discharging the same duty and then impose any conditions to a choice if the conditions have no reasonable relation to the object to be accomplished.

The state has asylums for the deaf and blind. The state may regulate private asylums. But if the state does not compel the deaf and blind to become inmates of the state asylums it cannot compel them to stay at home and prohibit their attending private asylums.

The state has established public schools. Education is compulsory. The state could compel all children to attend the public schools. It does not compel attendance at the public schools. Therefore, it could not prohibit education in private schools. It could regulate, but not prohibit, private schools.

The law authorizes the state fire marshal to order an owner to demolish a dangerous building, and if he fail the marshal may demolish it at the owner's expense. Neither alternative chosen by the owner is a privilege. Each is a duty. The state could not prohibit an owner who chooses to demolish the building himself, from hiring another person to do the work of demolition.

A municipality may regulate the cleaning of sidewalks. It may (1) compel all proprietors to pay into a municipal fund at so much per front foot, the city managing the fund and hiring the cleaners; or (2) require all proprietors to clean their sidewalks; or (3) provide for both modes, allowing the proprietor at his election to pay into

the fund or keep his sidewalk clean. But it cannot provide for both modes and then compel the proprietor who elects to keep his sidewalk clean to do the work himself and prohibit him from employing another to do the work.

The state may establish a bank, but if deposits in the state bank are not made compulsory the state cannot require that every person shall either deposit his funds in the state bank or keep his funds himself and prohibit his depositing with any other bank or person.

The state may make the owner of property liable to his neighbors for fires originating in his property. The state might require all owners to contribute to a state fund to cover losses in such secondary fires. The state cannot provide both modes as alternatives within the choice of the owner and then prohibit the owner, who chooses to accept the liability rather than contribute to the state fund, from insuring the new risk so fixed on him by the law.

In the state of Washington public and private employment bureaus were operated; the public bureaus as federal and municipal agencies, the private bureaus as private agencies. (**Adams vs. Tanner**, 244 U. S., 590.) The state did not require all employment to be conducted through the public bureau, but, upon the urging of the public employment offices who desired a monopoly of employment agencies (244 U. S., 596), the state enacted the law which practically prohibited the operation of private agencies. The Attorney General argues that this law was condemned by this court because the "service rendered by employment agencies was useful, commendable and in great demand" (p. 14). It cannot be denied that insurance of employers who elect to pay compensation directly under the Ohio law is useful, commendable and in great demand.

But the Attorney General argues that the Washington constitution did not give power to compel all to seek em-

ployment through the public agencies. Suppose the Washington constitution had given such authority, that would not be authority to prohibit private agencies.

Furthermore, the question in this case is whether the prohibition of insurance is violative of the federal constitution. The question in **Adams vs. Tanner** was whether the prohibition of employment agencies is a violation of the federal constitution. No provision of the constitution of Ohio and no provision of the constitution of Washington could validate an act which violates the federal constitution.

In the state of Washington public employment bureaus were established which workmen were permitted, but not compelled, to patronize, and the state under its law undertook to prohibit private agencies so that all who sought employment through employment bureaus must patronize the public bureaus. In Ohio a state fund to provide workmen's compensation was established which employers were permitted, but not compelled, to patronize, and the state under its law undertook to prohibit private insurance of workmen's compensation. If this court shall hold that private insurance, like private employment bureaus, is "useful, commendable and in great demand," that it is "useful" as distinguished from "vicious" and "non-useful" occupations (244 U. S., 596), and therefore cannot be prohibited, it follows that an employer cannot be compelled to waive his right to such private insurance in order to stand on his election to pay compensation directly.

II.

The Attorney General maintains that the power in Section 1465-65 to "change or modify its findings of fact" is authority to the Industrial Commission to prohibit insurance by an employer who elects to pay compensation directly apart from and unaided by the 1917 amendment to the law relating to those "who do not desire to insure."

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Section 1465-69 (as it stood prior to the 1917 amendment) provided that employers who abide by the rules of the Commission and who are of sufficient financial ability "may, upon a finding of such fact by the Industrial Commission of Ohio, elect to pay individually such compensation" and the Commission "may require such security or bond * * * as it may deem proper." It further provided that the Commission "may at any time change or modify its findings of fact herein provided for, if in its judgment such action is necessary or desirable to secure or assure a strict compliance with all the provisions of the law in reference to the payment of compensation," etc.

The authority of the Commission under this section is limited to a determination of whether the employer is or is not obeying the rules and is or is not of sufficient financial ability, and requiring or not requiring the security or bond as the Commission may deem expedient. Clearly, the power to "change or modify its findings of fact" does not extend the authority of the Commission beyond that exercised in the initial determination. It certainly was not the purpose of the legislature to give the employer who obeys the rules and is of sufficient financial ability and gives the required bond the right to pay compensation directly and then give the Commission power arbitrarily to deprive him of that right, upon the theory advanced by the Attorney General that "there is no limit upon the right of the Commission to modify its findings." (p. 17.)

Our complaint is aganst the "resolution and notices and threatened action of the Industrial Commission," (Rec., p. 24), and the action of the Commission was professedly, and, by the demurrer is admitted to be under the 1917 amendment (Rec., p. 22). However, if the action of the Commission was unconstitutional no legislative authority can sustain it.

III.

The Attorney General urges two considerations which he claims justify the legislature in prohibiting insurance of the employer who elects to pay compensation directly.

The first is that "an employer so protected is more apt to be careless," etc. (p. 19).

How can the Attorney General maintain that the state may prohibit the insurance of the employer on the ground that such insurance will lead to carelessness in the treatment of his employes when the state itself, in providing for the compensation fund, is offering a scheme which involves the same inducement to carelessness?

The state fund plan of compensation demonstrates that the legislature did not have in mind any such evil influence of insurance as its reason for prohibiting the insurance of the employer who pays compensation directly. The sole purpose of such prohibition was to induce patronage of the state fund, just as the purpose in the Washington law was so to discourage or prohibit private employment bureaus so as to induce patronage of the public bureaus.

The second consideration urged by the Attorney General is that employes of employers who are protected by private contracts of indemnity "may be subject to impositions on adjustments or settlements" (p. 19).

The evil of one person overreaching or imposing upon another will subsist so long as the profit system in human affairs endures. Regulation has been the method of protection against such evils, the state having the right to "abridge." (State vs. Railroad, 242 Mo., 339, cited by the Attorney General) (p. 38). It has not been supposed that the legislature may entirely prohibit a useful business which serves the wants of people merely through fear of the evils of some who may engage in the business. If such a fear can justify the prohibition of any useful business, then any trade, occupation or calling can be pro-

hibited, for tricksters are found in all of them. The Attorney General's argument is a restatement of the trite proposition of the extreme theoretical communist, that state management is bound to be conducted with justness, fairness, good will and efficiency because it lacks all the venal attributes inspired by the profit system.

The right to make contracts of indemnity or insurance is a natural right and is as invulnerable as the right to make and barter in bread or shoes, or to engage in any other useful occupation. We are not here challenging the right of the state to set up its own insurance scheme. Perhaps the state may engage in any commercial or productive enterprise. If so, then, upon the principle urged by the Attorney General and sustained by the Supreme Court of Ohio, a state may monopolize all the industrial and commercial affairs which heretofore have been conducted as private enterprises; and it may set up its insurance companies and banks, its merchandising stores, its factories and its farms, and then, without compelling its people to patronize its own institutions, it may prohibit its people from patronizing any other insurers, bankers, merchants, manufacturers or farmers.

The right to make contracts of indemnity or insurance, like the right to engage in any other legitimate business, heretofore has been considered "property," of which the federal constitution declares no person shall be deprived without due process of law. But, if the principle contended for by the Attorney General in this case and by the Attorney General in **Adams vs. Tanner** should prevail, a state through its own constitution and laws could **compel** a complete system of communism and a complete deprivation of private enterprise in the state without waiting for any amendment of that provision in the federal constitution.

The Attorney General urges that employers "having elected to take the privileges conferred by the legisla-

ture, and which might well have been denied them, cannot question the constitutionality of the restrictions which it seemed proper to impose" (p. 25). If that is true then the state may set itself up as farmer, manufacturer, merchant and purveyor of all things. It may not compel its citizens to make their purchases from the state, but may prohibit purchases from any others. Such prohibition of all other purchases ordinarily would be a violation of the federal constitution against the deprivation of private property, but according to the Attorney General, the citizens of the state could not complain because, having the "privilege" of making their own goods, they cannot question the constitutionality of the conditions imposed upon the enjoyment of that privilege.

Upon this proposition the Attorney General cites **Mackin vs. Detroit-Timken Axle Co.**, 153 N. W., 49, and states that the court held "that a party who made a claim before the industrial accident board could not complain that he had not the right to select or employ an attorney." (p. 25.) The Michigan act made attorneys and physicians' fees in accident claims subject to the approval of the board. The court, per Steere, J., said (p. 55):

> "The right of a claimant to select and employ an attorney or agent to represent him in the matter is recognized by the provision referred to."

It was in respect to the power to regulate attorneys' fees, and not that the claimant "had not the right to select or employ an attorney," that the court made the observation quoted by the Attorney General.

IV.

If we understand the Attorney General correctly, he maintains (p. 28) that if our position is correct employers could have elected to pay compensation directly and insured their liability and so "defeated the power of the

legislature to compel compulsory contribution to the state fund."

The power of the legislature to compel all employers to contribute to the state fund need not be discussed because it did not do so. If the legislature in 1917 had required all employers to pay into the state fund, it might be conceded, without affecting the case, that the prior election of an employer to pay compensation directly and the insurance of his liability would not interfere with the operation of such a law. That has no relation whatever to our proposition, which is, that the desire for indemnity insurance cannot be made the sole basis of disqualification of employers from eligibility to pay compensation directly.

The Attorney General urges that only legally enforceable obligations are within the protection of the constitutional provision against laws impairing the obligations of contracts, (p. 31) a proposition we do not dispute.

Life insurance usually is issued for a definite term or for life, the insurance being forfeitable for non-payment of premium. Fire insurance usually is issued for a definite term, the premium being paid in advance. Liability and workmen's compensation insurance usually is not issued for a definite term and for a fixed premium, as the payroll of wages is made the basis for computing the premium and an estimated payroll may be less or more in amount than the actual payroll of wages subsequently paid, and the premiums are due from a class of employers financially responsible. Such insurance, therefore, usually is issued with a cancellation provision, the insurance to continue until cancellation, with no provision for forfeiture for non-payment of premium. The policies in question were issued in 1914 for a cash premium and subsequent premiums to be computed upon actual payrolls. The policies contained the provision for cancellation by either party upon thirty days' written notice, and it was

provided that the contract should continue in force until cancelled in accordance with that provision. The contracts have not been cancelled. (Rec., p. 20.)

The contracts are legally enforceable, up to thirty days after the notice of cancellation, as fully and effectually as if issued to expire on that date.

In **Northern Michigan, etc., Telephone Co. vs. People's Mutual Telephone Co.**, 119 N. E. (Ind.), 212, referred to by the Attorney General (p. 32), the stipulation for cancellation in the contract was referred to but the decision of the court was based upon the proposition that the state has power to provide for the welfare of the people, notwithstanding that in so doing it may impair the obligations of contracts between telephone companies. While the fact that the contract could be cancelled by either party was referred to, the court did not determine whether the contract was valid or invalid, but held that the state could exercise its power to provide for the welfare of the people whether the contract was valid or invalid.

V.

The Attorney General maintains (p. 33) that the state, in enforcing its inhibition against the insurance of an employer who elects to pay compensation directly, may prohibit such employer making such contracts of insurance in other states. He states, "They may do so in other states if they choose. They may contract for all the indemnity insurance they desire, but if they do, they must either carry on their business outside of Ohio or pay directly into the compensation fund." As stated in our opening brief (p. 57), if the legislature by direct prohibition cannot control its citizens in making contracts of insurance in other states, it cannot do so by indirection, as by compelling a forfeiture of any right enjoyed by others in the state for making such contracts out of the state. If the Attorney General's proposition is sound,

then the state could declare that no person shall engage in manufacturing or mercantile pursuits if he shall make any contracts of insurance in other states.

The Attorney General maintains that the system of compensation under the state fund is insurance (p. 34); and again, that it is "complete indemnity" (p. 20). He states that if the employer does not have full indemnity in the state fund "it is because he is a law violator," and that he ought not "to be allowed to indemnify himself so that he may safely violate the law" (p. 34).

In our opening brief (pp. 62-68) we have endeavored to show that the state scheme of compensation is not insurance. It did not require the 1917 amendment, or any other provision in the compensation law, to prohibit an employer indemnifying himself against damage or compensation for his wilfully criminal acts. Such insurance never was lawful. (**Ritter vs. Mutual Life Ins. Co.**, 169 U. S., 139; **Vance on Insurance**, 45.) But, when the statute requires the employer to furnish a safe place to work and makes the employer liable for all the acts of his agents so that all the duties and liabilities of the employer at common law are fixed by statute, it cannot be said that the employer cannot indemnify himself against his liability on the theory that he would be insuring against the consequences of his wilful and criminal acts.

VI.

The Attorney General contends that the amendment of 1917 was intended to apply to existing contracts of insurance. In our opening brief we maintained that a statute should have prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively, and we referred to the authorities supporting this proposition. The Attorney General has not pointed out the language in the laws in question which shows clearly a legislative intention that

the prohibition shall apply to contracts of insurance made before the law was enacted.

The Attorney General has referred to numerous authorities, some of which were cited in our opening brief, to the effect that a contract cannot be given such operation as to prevent or interfere with the police power of the legislature. As stated in our opening brief, we do not dispute this proposition (pp. 45-46). If it had been determined by the legislature to prohibit the insurance of the employer's liability, on the ground that such insurance would tend to the carelessness of the employer, and the court should determine that because of such evil influence on the employer the legislature has the power to prohibit such insurance, it would follow that existing contracts of insurance could not be set up to defeat the power of the legislature. Such supposed evil influence on the insured has never yet been held to be sufficient grounds for the prohibition of insurance. Furthermore, it is apparent that the legislature of Ohio does not regard the insurance of the employer as having any such evil influence on the employer, for the state itself is managing a scheme which, although in our judgment it does not amount to insurance, would have any evil tendency supposed to be promoted in any insurance of the employer.

Mr. Hogan has submitted propositions substantially the same as those urged by the Attorney General. He contends that no vested rights were established under the insurance contracts because the parties made the contracts with knowledge of the power of the legislature to change the terms upon which employers may elect to pay compensation directly or pay into the state fund. He maintains that the authority to pay compensation directly is a "license," while the Attorney General contends that it is a "privilege." And he states that the police power of the state cannot be "bartered away," meaning thereby that existing contracts of insurance

cannot interfere with the power of the legislature to compel contribution to the state fund, and he contends that the acts in question were intended to apply to existing contracts of insurance.

Our comments on these several propositions and the authorities cited are sufficiently set forth in our opening brief and our foregoing reply to the brief of the Attorney General.

Respectfully submitted,

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FRANK C. THORNTON AND THE CLEVELAND STAMPING AND TOOL COMPANY,

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THOMAS J. DUFFY AND HERBERT L. ELIOT, MEMBERS OF AND COMPOSING THE INDUSTRIAL COMMISSION OF OHIO,

Defendants in Error.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This action originated on December 14, 1917, by the filing of a petition in the Court of Common Pleas of Franklin county, Ohio, by the plaintiff in error, Thornton. He prayed that the defendants in error be enjoined from revoking, changing and modifying certain findings by them theretofore made, to the effect that he, an employer of five or more workmen, was of sufficient financial ability and credit to render certain his paying compensation and furnishing medical services to his injured employes and permitting him to carry his own insurance under the provisions of the workmen's compensation law of Ohio.

It was claimed by him that the defendants were about to revoke said finding on the sole ground that he insisted upon the right to indemnify himself by contract against his liability for such compensation and services.

On the ninth of April, 1918, The Cleveland Stamping and Tool Company, a corporation and an employer of labor, filed an answer and cross-petition containing substantially the same allegations as the petition and praying for the same relief.

Demurrers were sustained to the petition and cross-petition and final judgment entered in favor of the defendants, which upon error proceedings were affirmed by the Court of Appeals of Franklin county, Ohio, and by the Supreme Court of the state.

The opinion of the Supreme Court of the State of Ohio will be found at **Appendix A**, the opinion of the Court of Appeals at **Appendix B** and the opinion of the trial judge at **Appendix C**.

THE CONSTITUTIONAL PROVISION.

The first workmen's compensation act in Ohio was passed by the General Assembly in 1911 and was not compulsory. Its constitutionality was sustained in **State ex rel. v. Creamer**, 85 O. S., 349, and in **Jeffrey Mfg. Co. v. Blagg**, 235 U. S., 571.

In 1912, **Sec. 35 of Art. II of the Ohio Constitution** was adopted. Its provisions are as follows:

> "For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational diseases, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state; determining the terms and conditions upon which payment shall be made therefrom, and taking away any or all rights of action or defenses from employes and employers; but no right of action

> shall be taken away from any employe when the injury, disease or death arises from failure of the employer to comply with any lawful requirement for the protection of the lives, health and safety of employes. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto."

It will be observed that it conferred upon the legislature power to pass laws establishing a state fund to be created "**by compulsory contribution thereto by employers.**" Its language is stronger than found in the Constitution of the State of New York and considered by this court in **New York Central R. R. Co. v. White**, 243 U. S., 188.

THE OHIO STATUTES INVOLVED.

In pursuance of the above constitutional authority, the legislature at once passed the present compulsory law, to which amendments important in this controversy have been made. The act became effective March 17, 1913. In this controversy we are particularly concerned with section 22 of the act **(Sec. 1465-69, G. C., 103 O. L., 79)**, which is set out in full in the brief of plaintiff in error at page 71, et seq. The following portion of the section is pertinent here:

> "* * * And provided further, that such employers who will abide by the rules of the state liability board of awards and as may be of sufficient financial ability or credit to render certain the payment of compensation to injured employes or to the dependents of killed employes, and the furnishing of medical, surgical, nursing and hospital attention and services and medicines, and funeral expenses equal to or greater than is provided for in this act, or such employers as maintain benefit funds or departments

or jointly with other employers maintain mutual associations of such said financial ability or credit to which their employes are not required or permitted directly or indirectly to contribute, providing for the payment of such compensation and the furnishing of such medical, surgical, nursing and hospital services and attention and funeral expenses, may, upon a finding of such facts by the state liability board of awards elect to pay individually or from such benefit fund department or association such compensation, and furnish such medical, surgical, nursing and hospital services and attention and funeral expenses directly to such injured or the dependents of such killed employes; and the state liability board of awards may require such security or bond from said employers as it may deem proper, adequate and sufficient to compel, or secure to such injured employes, or to the dependents of such employes as may be killed, the payment of the compensation and expenses herein provided for, which shall in no event be less than that paid or furnished out of the state insurance fund, in similar cases, to injured employes or to the dependents of killed employes, whose employers contribute to said fund; and said board shall make and publish rules and regulations governing the mode and manner of making application and the nature and extent of the proof required to justify such finding of facts by the board as to permit such election by such employers, which rules and regulations shall be general in their application, one of which rules shall provide that all employers electing directly to compensate their injured and the dependents of their killed employes as hereinbefore provided, shall pay into the state insurance fund such amount or amounts as are required to be credited to the surplus in paragraph two of section seven hereof.

The state liability board of awards may at any time change or modify its finding of facts herein provided for, if in its judgment such action is necessary or desirable to secure or assure a strict compliance with all the provisions of this act in reference to the payment of compensation and the furnishing of medical, nurse, and hospital services and medicines and funeral expenses to injured and the dependents of killed employes."

Section 54 of the act (Sec. 1465-101, 103 O. L., 91), also provided:

> "All contracts or agreements entered into by any employer, the purpose of which is to indemnify him from loss or damage on account of the injury of such employe by accidental means or on account of the negligence of such employer or such employer's officer, agent or servant, shall be absolutely void, unless such contract or agreement shall specifically provide for the payment to such injured employe of such amounts for medical, nurse and hospital services and medicines, and such compensation as is provided by this act for injured employes; and in the event of death shall pay such amounts as are herein provided for funeral expenses and for compensation to the dependents of those partially dependent upon such employe; and no such contract shall agree, or be construed to agree, to indemnify such employer, other than hereinbefore designated, for any civil liability for which he may be liable on account of the injury to his employe by the wilful act of such employer, or any of such employer's officers or agents, or the failure of such employer, his officers or agents, to observe any lawful requirement for the safety of employes."

The Supreme Court of Ohio, in **State ex rel. v. Liability Corp.,** 95 O. S., 289, held that while liability companies were prohibited from writing employers' liability insurance generally, they still could write policies under section 22 of the act. This decision was rendered January 1, 1917.

On February 16, 1917, the legislature amended old section 54 so as to read as follows **(107 O. L., 7):**

> "All contracts and agreements shall be absolutely void and of no effect which undertake to indemnify or insure an employer against loss or liability for the payment of compensation to workmen or their dependents, for death, injury or occupational disease occasioned in the course of such workmen's employment, or which provide that the insurer shall pay such compensation, or which indemnify the employer against damages when the injury, disease or death arises from the failure to comply with any lawful

requirement for the protection of the lives, health and safety of employes, or when the same is occasioned by the wilful act of the employer or any of his officers or agents, or by which it is agreed that the insurer shall pay any such damages. No license or authority to enter into any such agreements or issue any such policies of insurance shall be granted or issued by any public authority."

On March 20, 1917, it amended old section 22 so as to require the Industrial Commission to find, as an additional fact, to enable employers to carry their own insurance, that they "do not desire to insure the payment thereof or indemnify themselves against loss sustained by the direct payment thereof."

The requisites then to self-insurance, all of which must be found to exist by the commission, now are:

(1) That such employers will abide by the rules of the commission.

(2) That they must be of sufficient financial standing to render certain the payment of compensation and funeral expenses and the furnishing of necessary medical services and attention.

(3) That they do not desire to indemnify themselves against loss sustained by payments made for the above mentioned purposes.

At the same session, the legislature amended the general insurance laws so as to permit liability insurance against loss, expense or liability, risk or bodily injury or death by accident, disability, sickness or disease suffered by others for which the insured might be liable or have assumed liability, **not including workmen's compensation.** (107 O. L., 647.)

THE ALLEGATIONS OF THE PETITION AND CROSS-PETITION.

The plaintiffs in error are employers of labor within the meaning of the workmen's compensation law, and aver that in January, 1914, the Industrial Commission made a finding that they were of sufficient financial ability and credit to be permitted to carry their own insurance; that they gave bond as required by law and made the required payment into the state insurance fund, and that in January, 1914, also, they made contracts with the Aetna Life Insurance Company, whereby it agreed to pay to their injured employes such amounts for medical, nurse and hospital services and medicines, and such compensation as the legislation in question provided, and agreed to indemnify the parties against their liability for such losses or expenses; and that each of the plaintiffs in error agreed to pay the company a cash premium; that they further agreed to pay said premium on April 29, 1914, being an amount computed on estimated payrolls for a year from that date and a like amount annually thereafter until said contract should be cancelled, which might be done by either of the parties thereto upon thirty days written notice to the other party, such cancellation to be effective at noon of the date specified therefor in such notice; that it was further agreed that said contract should continue in force until cancelled in accordance with said provision; that the amounts to be paid as premiums were to be adjusted according to payrolls; that said contracts contained no provision for termination of any of the rights of plaintiffs in error thereunder, except upon cancellation, and that such cancellation has never been made by either party.

Both plaintiffs in error complain that unless they notify the Industrial Commission that they will cease carrying the indemnity aforesaid, the latter will revoke its findings under which they have been permitted to carry their own risks.

POINTS OF ARGUMENT.

I.

The legislature, having the power to require all employers of five or more workmen to contribute to the state insurance fund, may prohibit such employer's carrying his own risk. If it grants him such privilege, it may do so upon such conditions as seem wise and proper to it. Its determination in prescribing such conditions is not subject to review by the courts.

II.

The Industrial Commission, under the provisions of section 1465-69, G. C., may at any time change or modify its findings of fact as to the qualification of an employer to carry his own risk, if in its judgment such action is necessary or desirable to secure a strict compliance with the provisions of the compensation law.

If in the exercise of its honest judgment it concludes that the carrying of indemnity insurance by an employer tends to interfere with or militate against the proper operation of the law, it may decline to find in favor of such employer's right to compensate his employes, and its judgment honestly exercised is not subject to judicial review.

III.

Granting, for the sake of argument, that the legislation complained of amounts to a classification of employers, reasons may be found justifying such classification. Unless the action of the legislature in making such classification was arbitrary and wholly unreasonable, it will not be disturbed by the courts.

IV.

The contracts referred to in the petition and cross-petition herein were made subject to the right of the legislature to require all employers to contribute to the state insurance fund or to place limitations upon the privilege of carrying their own risks, and of the further right and duty of the Industrial Commission to change and modify its findings when warranted by its best judgment. Said contracts are not within the provisions of Art. I, Sec. 10, or Art. XIV, Sec. 1, of the Constitution of the United States.

V.

The common law right to insure or seek indemnity must give way where it conflicts with the constitutional provision authorizing a compulsory compensation system and legislation authorized by such provision.

VI.

Indemnity contracts, in existence at the time of the amendments complained of, are not exempt from their provisions.

I.

The Legislature, Having the Power to Require All Employers of Five or More Workmen to contribute to the State Insurance Fund, May Prohibit Such Employer Carrying His Own Risk. If it Grants Him Such Privilege, it may do so Upon Such Conditions as Seem Wise and Proper to it. Its Determination in Prescribing Such Conditions is not Subject to Review by the Courts.

The brief for plaintiffs in error frankly concedes that the legislature has the power to compel all employers to contribute to the state workmen's compensation fund or provide the conditions upon which they may pay into the state fund and the conditions upon which they may pay compensation directly to employes. Stated in another form, the adoption of the constitutional amendment in question took away from employers the right to compensate their employes directly, unless the legislature should see fit to confer that privilege. Of course if contribution were made compulsory, there would be no reason for indemnity, because the state, in consideration of the premium paid by the employer, would compensate the employe.

The grievance of plaintiffs in error is not against the enactment of any statute prescribing the conditions upon which they may carry their own insurance, but against the act of the people in amending the constitution so as to authorize the legislature to make contribution to the state fund compulsory. What right of plaintiffs in error is violated by the act of the legislature, in prescribing a condition which in its judgment is reasonable and proper to the granting of the privilege of which they have availed themselves?

Following the concession that if the legislature had made payments into the fund compulsory upon all employers, it would not have exceeded its power under the constitution, by what reasoning can it be said to have done so when it has stopped short of the point to which it might have gone? When plaintiffs in error complain of a classification which they say is unconstitutional, they overlook the fact that such classification is made possible by the constitution itself.

As well said by Donahue, J., speaking for the Supreme Court of Ohio:

> "It necessarily follows that if the General Assembly has the power at any time to withdraw from these employers this privilege to elect to pay such compensation and furnish such services and attention and funeral expenses directly, it can from time to time impose such conditions as in its judgment seems wise and necessary to safeguard the main purpose and intent, not only of the act itself, but of the constitutional provision under authority of which this law was passed.
>
> It also follows that whoever seeks to avail himself of the benefits of this exception in his favor, must comply with the conditions imposed."

If the people in amending the constitution had reserved to employers the right to compensate their employes directly, then the question as to whether the alleged classification made by the legislature was arbitrary and unreasonable, might be important. There is, however, no limitation upon the power of the legislature to require every employer to contribute to the state fund. Whether or not the electors of the state acted wisely in writing into the constitution the language they adopted, might be a debatable question. But it was their obvious intention to give to the legislature full power to make the plan of compensation workable. They made no exceptions in favor of any employers. The legislature has made certain exceptions upon conditions which had weight with

it. What would be the force of a holding that these conditions were unreasonable, when the legislature has power to withdraw the privilege absolutely? Certainly nothing more than to force the legislature, in view of the policy which it has adopted, to take from all employers the right to carry their own risks including those who are willing to comply with the law as it stands.

A number of cases are cited to sustain the proposition which counsel assert, that the legislature, in refusing to employers who desire to take indemnity the right to carry their own insurance, is making an arbitrary, unjustifiable and unreasonable classification. Extended comment on these authorities does not seem necessary because they are cases in which the right of the complainant to do a thing was prohibited.

Their leading case is **Adams v. Tanner**, 244 U. S., 590, where a statute of the State of Washington, prohibiting an employment agent from receiving compensation or remuneration from any person for furnishing him or her with employment or information leading thereto, was held unconstitutional. But the court held that the service rendered by employment agencies was useful, commendable and in great demand and used this language:

> "The statute is one of prohibition, not regulation."

Now, suppose there had been no constitutional objection to the legislature's prohibiting such business, as there is none here to its compelling employers to contribute to the state fund instead of carrying their own insurance and indemnifying themselves: Would the court have reached the conclusion that it did? Can it be said here that the action of the legislature, in regulating the carrying of their own risks by employers, is objectionable where the right to prohibit exists? In the Adams case the court said there was not the right to

prohibit, but only the power to regulate. But the plaintiffs in error are contending here that there is no right to regulate in the manner chosen by the legislature, although there is a right to prohibit absolutely.

C. B. & Q. R. R. Co. v. McGuire, 219 U. S., 549, is another authority upon which reliance is placed. There the court held that the state had power to prohibit contracts limiting liability for injuries made in advance of the injury received and to provide that the subsequent acceptance of benefits under such contracts should not constitute satisfaction of a claim for injuries received after the contract. **Mr. Justice Hughes**, speaking for the court, said (p. 565):

> "* * * The legislature, provided it acts within its constitutional authority, is the arbiter of the public policy of the state. While the court, unaided by legislative declaration and applying the principles of the common law, may uphold or condemn contracts in the light of what is conceived to be public policy, its determination as a rule for future action must yield to the legislative will when expressed in accordance with the organic law. If the legislature had the power to incorporate a similar provision in the statute when it was passed originally, it had the same power with regard to future transactions to enact the amendment."

Certainly in the case at bar, if the legislature could have prohibited the employer from carrying his own insurance, it had the right to impose, when it passed the compensation law, the condition that it is now seeking to impose, and that right being found in the organic law, no question of classification or policy arises.

Truax v. Raich, 239 U. S., 33, was a case in which it was held that a state might not, in order to protect citizens of the United States in their employment against non-citizens, require that employers only employ a specified percentage of aliens. The following expression is the keynote of the decision. (p. 41):

> "* * * It requires no argument to show that the right to work for a living in the common occupa-

> tions of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the amendment to secure. * * *"

However, in the case at bar, the right of an employer to carry indemnity is not of the essence of personal freedom, because the legislature may under the constitution deprive him of that right by compelling him to pay into the state fund.

Similarly, all cases cited by counsel may be distinguished upon the ground that the party complaining had an absolute constitutional right to do a thing which the legislature was seeking to prevent. Here, the power of the legislature to deprive these plaintiffs in error of the right to carry their own risk, is conceded. What complaint have they to make if instead of denying the whole loaf it accords them the one-half?

II.

The Industrial Commission, Under the Provisions of Section 1465-69, G. C., May at Any Time Change or Modify its Findings of Facts as to the Qualification of an Employer to Carry His Own Risk, if in its Judgment Such Action is Necessary or Desirable to Secure a Strict Compliance with the Provisions of the Compensation Law, and if in the Exercise of its Honest Judgment it Concludes that the Carrying of Indemnity Insurance by an Employer Tends to Interfere with or Militate Against the Proper Operation of the Law, it May Decline to Find in Favor of Such Employer's Right to Compensate His Employes, and its Judgment Honestly Exercised is not Subject to Judicial Review.

The legislature, in passing the first compensation act, under the constitutional amendment provided in section 1465-69, G. C., that:

> "The state liability board of awards may at any time change or modify its finding of facts herein provided for if in its judgment such action is necessary or desirable to secure a strict compliance with all the provisions of this act," etc.

This provision was a part of the act under which the plaintiffs in error made their applications to carry their own risk and were permitted so to do. There is no limitation upon the right of the commission to modify its findings because it was understood that much must be left to its discretion to secure a proper administration of the law. The legislature was not bound to require a finding in favor of an employer desiring to pay compensation directly and could it therefore be said that it

could not withdraw such privilege by authorizing the commission to change or modify its findings when in its judgment such action was necessary or advisable? And the commission having now come to the conclusion that the carrying of indemnity by employers militates against the satisfactory administration of the law, is it the province of the court to stay its hand because it may disagree with its conclusion? On that point the Supreme Court of Ohio said:

> "The experience of four or more years under this Workmen's Compensation Law may have demonstrated to the entire satisfaction of this commission that it is necessary or desirable to change or modify its former findings of fact in order to secure or assure a strict compliance with the law, where employers have elected to pay this compensation direct, and have later entered into a contract with an indemnity company, * * *.
>
> It therefore follows, that if the Industrial Commission should find that such contracts furnish an opportunity for unfair or fraudulent settlement, and had resulted or might result not only in avoiding a strict compliance with the provisions of this act, but also in some instances defeat its intent and purpose, especially where the injured employe or the dependents of an employe killed in the course of his employment are not fully advised of their rights under Section 27 of this act and Rule 18 adopted by the Industrial Commission under authority of the act creating that Commission, it would have the power under this provision of Section 22 to change or modify its former findings of fact in reference to employers who had elected to pay individually from a benefit fund, department, or association such compensation direct."

III.

Granting, for the Sake of Argument, that the Legislation Complained of Amounts to a Classification of Employers, Reasons May be Found Justifying Such Classification. Unless the Action of the Legislature in Making Such Classification was Arbitrary and Wholly Unreasonable, it Will not be Disturbed by the Courts.

It has been urged vigorously that liability insurance or contracts indemnifying employers are not inimical to public policy. We may concede that the reasons urged against such contracts are not sufficient of themselves to induce the courts to declare such contracts contrary to public policy. But we are to remember that public policy is declared by the legislature and when it acts within its authority, contrary holdings of the courts must give way. **C. B. & Q. R. R. Co. v. McGuire,** supra.

Reasons are apparent why the carrying of indemnity by an employer interferes with the highest degree of efficiency in the administration of the workmen's compensation law. An employer so protected is more apt to be careless about the safety of the places in which his men must work, the guarding of machinery, the character of his superior servants, the instruction given to his employes and the general condition of his factory.

It is to the interest of the liability company, insuring the employer and not employe, to settle every claim as cheaply as possible and to avoid making any payment where it can do so. Those with whom it has to deal may not be cognizant of their rights. They may be subject to impositions on adjustments or settlements. One of the chief reasons for the enactment of any such law is

that it provides speedy relief for a class of persons who are usually without substantial means. Just as many a litigant is deterred from standing upon his rights by the prospect of a long and expensive litigation, so the injured workmen may be induced to make unfair settlements by the prospect of having to deal with an indemnity company. Then, as Judge Donahue, speaking for the Supreme Court of Ohio, said, if an employer desires insurance, the state will furnish it to him upon his making contribution to the fund. The reasons urged for taking indemnity are without force, for an employer by becoming a contributor to the compensation fund has complete indemnity. If he can carry his insurance with a liability company for less than he can carry it with the state, a fair inference arises that it must be because the company can find some means of disposing of claims not in harmony with the policy of the workmen's compensation law. At least the legislature had a right to take all these points into consideration and it had the benefit of experience with employers who took indemnity before the amendment complained of was adopted.

Can this court see clearly that its action attacked here was arbitrary or unreasonable?

In **M. K. & T. R. R. Co. v. May**, 194 U. S., 267, **Mr. Justice Holmes**, speaking for this court, said: (p. 269.)

> "When a state legislature has declared that in its opinion policy requires a certain measure, its action should not be disturbed by the courts under the Fourteenth Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched. * * * Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

In **Carroll v. Greenwich Insurance Co.**, 199 U. S., 401, this court held that an Iowa statute, prohibiting combinations of insurance companies as to rates, commissions and manner of transacting business, was not within the inhibition of the Fourteenth Amendment. The section in question made it unlawful for two or more **fire** insurance companies to enter into certain combinations or agreements and it was urged that there was no justification for the particular selection of fire insurance companies in particular for such prohibitions. The court said (p. 411):

> "Again, if an evil is specially experienced in a particular branch of business, the constitution embodies no prohibition of laws confined to the evil, or doctrinaire requirement that they should be couched in all-embracing terms. It does not forbid the cautious advance, step by step, and the distrust of generalities which sometimes have been the weakness, but often the strength, of the English legislation. **Otis v. Parker**, 187 U. S., 606, 610, 611. And if this is true, then in view of the possible teachings to be drawn from a practical knowledge of the business concerned, it is proper that courts should be very cautious in condemning what legislatures have approved.
>
> If the legislature of the State of Iowa deems it desirable artificially to prevent, so far as it can, the substitution of combination for competition, this court cannot say that fire insurance may not present so conspicuous an example of what the legislature thinks an evil as to justify a special treatment."

In **Bachtel v. Wilson**, 204 U. S., 36, the court, in speaking of the selection of certain persons for the operation of a statute, said (p. 41):

> "In short, the selection, in order to become obnoxious to the Fourteenth Amendment, must be arbitrary and unreasonable, **not merely possibly, but clearly and actually so.**"

In **C. B. & Q. R. R. Co. v. McGuire**, supra, it was said (p. 569):

> "The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of **power** is not to be confused with the scope of legislative consideration in dealing with a matter of **policy**. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."

Justice Day, speaking for the court in **McLean v. Arkansas**, 211 U. S., 539, said at p. 547:

> "It is then the established doctrine of this court that the liberty of contract is not universal, and is subject to restrictions passed by the legislative branch of the government in the exercise of its power to protect the safety, health and welfare of the people. It is also true that the police power of the state is not unlimited, and is subject to judicial review, and when exerted in an arbitrary or oppressive manner, such laws may be annulled as violative of rights protected by the constitution. While the courts can set aside legislative enactments upon this ground, the principles upon which such interference is warranted are as well settled as is the right of judicial interference itself.
>
> The legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no

> ground for judicial interference, unless the act in question **is unmistakably and palpably in excess of legislative power.**"

See also the fully considered case of **German Alliance Ins. Co. v. Kansas**, 233 U. S., 389.

It has been urged that no possible injury can be suffered by the employes of an employer who carries indemnity, because the Industrial Commission must determine the amounts to which they are entitled and injuries suffered, and some Ohio Supreme Court cases are cited where comment was made on this provision of law. But that is a mere statement of a theory. Practical experience may have led to a different conclusion. Nor was anything said by the Supreme Court of Ohio inconsistent with its conclusions in the case at bar. On the contrary, in **State ex rel. U. S. F. & G. Co.**, 96 O. S., 250, **Nichols, C. J.**, was careful to say for the court at p. 257:

> "The matter of the wisdom or unwisdom of permitting indemnity insurance contracts to survive in Ohio has no possible connection with this question."

It may be that injuries were received which were never reported to the commission or that settlements and agreements were made or evidence withheld which would result in injustice. In any event, the legislature thought it wise to take away from employers the right to indemnity, and, as this court has said, that body is the best judge of the existence of the evil and of the remedy to be applied.

In **Hunter v. Coal Co.**, 175 Ia., 245, the court said (pp. 278-279):

> "I. Section 8 prohibits any contract, rule, regulation or device whatsoever that shall operate to relieve the employer, in whole or in part, from any liability created by the act, except as the act provides. Section 18 is that every device by which the employe is to pay an insurance premium against the com-

pensation provided in the act is null and void, and no wages may be withheld to pay such premium, under penalty by fine; and the employe shall have no power to waive any provisions of the act if thereby is lessened the statute compensation. And Section 13 provides that the amount of compensation fixed by the statute may not be reduced by contribution from employes.

In essence, these are guards against contracts to reduce liability for negligence, and, so far from being an invasion of the right to contract, are precautions against allowing the employer to first accept the act and then avoid its provisions by subterfuge. It is no interference with the right to make agreement that the legislature enacts what it thinks will prevent the breach of an agreement entered into. What is taken away is not the right to bargain, but the right, by deviousness, to break the bargain made.

Aside from that the right to make contracts is not infringed by statutes aimed to insure compliance with contracts entered into, it should not be claimed at this late date that the legislature has no power to prevent contracts between master and servant which fix a low price for, and so stimulate, the killing and maiming of men—contracts which the employe may feel compelled to make to obtain or retain employment."

In **New York Central & Hudson River R. R. Co. v. Williams**, 199 N. Y., 108, the court sustained the validity of a statute requiring certain employers to pay to their employes their wages in cash. The court said (p. 123):

"A classification of corporations with reference to their relations to the public is manifestly reasonable. No other corporations occupy precisely the same relation to the public as steam surface railroad companies, and the fact that no other corporations may have been subjected to the same requirement in respect to the payment of wages does not invalidate the requirement. As long as the classification has a basis in reason and all corporations of the same class are treated alike, the action of the legislature may not be condemned by the courts for inequality."

See also the Second Employers' Liability Cases decided by this court. **(Mondou v. Railway Co.**, 223 U. S., 1.)

And finally, these plaintiffs in error, having elected to take the privileges conferred by the legislature and which might well have been denied them, cannot question the constitutionality of the restrictions which it seemed proper to impose.

In holding that a party who made a claim before the industrial accident board could not complain that he had not the right to select or employ an attorney, the Supreme Court of Michigan, in **Mackin v. Detroit-Timkin Axle Co.**, 153 N. W., 43, said at p. 56:

> "These restrictions in the act, as applied to those who submit to its provisions by election, certainly cannot be held unconstitutional. They were deemed by the legislature proper and necessary to safeguard the interests of the class for whose benefit largely this act to 'promote the welfare of the people of the state' was passed; they are germane to the purpose of the act, and in the light of conditions previously existing in litigation over personal injuries to workmen, of which courts of last resort have taken judicial notice in construing workmen's compensation acts, are beneficial and appropriate, if not essential, to an efficient administration of the law."

IV.

The Contracts Referred to in the Petition and Cross-Petition Herein Were Made Subject to the Right of the Legislature to Require all Employers to Contribute to the State Insurance Fund or to Place Limitations Upon the Privilege of Carrying Their Own Risks, and of the Further Right and Duty of the Industrial Commission to Change and Modify its Findings When Warranted by its Best Judgment. Said Contracts are not Within the Provisions of Art. I, Sec. 10, or Art. XIV, Sec. 1, of the Constitution of the United States.

We are to bear in mind that the statute under which the plaintiffs in error obtained the finding in their favor conferred upon the Industrial Commission the right to modify such finding if it was found necessary for the proper administration of the law. We have also the concession that the legislature at any time might have taken away from all employers the right to carry their own risks and compel them to contribute to the state fund. Suppose it had seen fit to pursue this course after the plaintiffs in error had made their contracts with the liability company: Would it be contended with any show of reason that such action would have resulted in the violation of the obligation of a contract? If not, what becomes of the claim made for the plaintiffs in error here? It is to be remembered that the constitutional provision authorizing compulsory contributions was a part of each and every contract made by employers.

As said by this court in **Hudson County Water Company v. McCarter**, 209 U. S., 349, at p. 357:

> "The defense under the Fourteenth Amendment is disposed of by what we have said. That under

Article I, Section 10, needs but a few words more. One whose rights, such as they are, are subject to state restriction, **cannot remove them from the power of the state by making a contract about them.**"

In **Railway Co. v. Mottley**, 219 U. S., 467, it is said in the syllabus, which is a fair statement of the law in the case:

"* * * The power of congress to act in regard to matters delegated to it is not hampered by contracts made in regard to such matters by individuals; but contracts of that nature are made subject to the possibility that even if valid when made congress may by exercising its power render them invalid."

Green v. Appleton Woolen Mills, 162 Wis., 145, is a most excellent case. We shall quote from it but briefly (p. 150):

"We do not find any evidence **that the contract of employment was for any definite period of time and hence do not see where the matter of violating any contract arises.** The extent to which a minor may bind himself by contract is peculiarly within the field of legislative discretion. If the contract was made before the 1911 law was passed and extended beyond the time of the accident, the legislature might in the legitimate exercise of the police power abrogate it."

We think this case exactly in point. Clearly, the legislature of Ohio had constitutional authority to compel all employers to contribute to the state fund and thus make indemnity unnecessary. The contracts between the plaintiffs in error and the liability company were of indefinite duration, subject to termination at the will of either. As suggested by the Supreme Court of Wisconsin, there was no obligation to be violated and the constitutional power to terminate the contract at any time existed.

In **Union Dry Goods Co. v. Georgia Public Service Corp.**, 142 Ga., 841, the court quoted with approval from

an opinion of this court in **Manigault v. Springs**, 199 U. S., 473 (p. 480):

> "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, with its various ramifications, is known as the police power, is in the exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals."

In **State ex rel. Pratt v. Seattle**, 73 Wash., 396, the court said at p. 402:

> "The foregoing principles make it clear that it is within the power of the state to enact and enforce police regulations, even though to do so may render less valuable certain contracts between individuals and totally abrogate others. If the principle were not sound, the result would be that individuals and corporations could, by private contract between themselves, in anticipation of legislation, render of no avail the police regulations of the state, no matter how vital or necessary such regulations might prove to be for the public good."

It might be suggested here that if the position of the plaintiffs in error is correct, all employers subject to the workmen's compensation law could have made similar contracts and thus defeated the power of the legislature to compel compulsory contribution to the state fund.

In **German Insurance Co. v. Commonwealth**, 141 Ky., 606, the court say: (p. 611.)

> "It may also be here noted that although the constitution of the United States forbids any state from impairing by constitution or law the obligations of the contract, there is yet the exceptions to this general rule that the state cannot contract away its police power or its right to abrogate or annul contracts it has made in contravention of this power."

In **Hammond Packing Co. v. Arkansas**, 212 U. S., 322, we find this statement. (p. 345):

> "The chartered right to do a particular business did not operate to deprive the state of its lawful police authority, and therefore the franchise to do the business was inherently qualified by the duty to execute the charter powers conformably to such reasonable police regulations as might thereafter be adopted in the interest of the public welfare."

The situation in the case at bar is characterized exactly in the following language from **Missouri Pacific R. R. Co. v. Kansas**, 216 U. S., 262, appearing at p. 275:

> "As the argument concedes the existence of the legislative power to repeal, alter or amend, and as it is impossible to assume that a legislative act has impaired a contract without by the same token declaring that such act has either repealed, altered or amended, hence the proposition relied upon really contends that the contract has been unlawfully impaired by the exercise of a power which it is conceded could lawfully repeal the contract. And of course this reasoning is controlling, irrespective of the scope of the alleged charter right, since whatever be the extent of the right conferred it was subject to the reserved power."

This court again declared in **Texas and New Orleans R. R. Co. v. Miller**, 221 U. S., 408, at p. 414:

> "The doctrine that a corporate charter is a contract which the constitution of the United States protects against impairment by subsequent state legislation is ever limited in the area of its operation by the equally well settled principle that a legislature can neither bargain away the police power nor in anywise withdraw from its successors the power to take appropriate measures to guard the safety, health and morals of all who may be within their jurisdiction."

It is well understood, of course, that the charter of a corporation constitutes a contract. But there are authorities without number to the effect that when the right to amend or repeal such charter is reserved, there is

no impairment of contract when such action is taken. Cases of that character are:

Railroad Co. v. Garrett, 231 U. S., 298.
In re Dissolution of College Hill Land Assoc., 157 Calif., 596.
Venner v. The Chicago City Ry. Co., 246 Ill., 170.

A closely analogous situation is that in which a bank incorporates when the law fixes but a single liability upon stockholders, and afterward, under a provision providing for the amendment or repeal of corporate charters, the double liability is imposed. The contract with the stockholders, as evidenced by the charter, was unquestionably valid, was not contrary to any rule of public policy and bound them to make but one payment for their stock. Yet under the reserved power to amend it has been held over and over again that the same stockholders may be subjected to the double liability.

Sherman v. Smith, 1 Black, 587.
Looker v. Maynard, 179 U. S., 46.
McGowan v. McDonald, 43 Pac., 418.
Russell v. Heath, 47 N. W., 585.
Smathers, Receiver, v. The Western Carolina Bank, 47 S. E., 893.
Railway Co. v. Board of Supervisors, 35 Wis., 257.
Gardner v. Hope Insurance Co., 9 R. I., 194.
Barnes v. Arnold, 45 N. Y. App. Div., 314. (Affirmed by the New York Court of Appeals, 62 N. E., 1093.)

In **People v. Hawley**, 3 Mich., 330, it was held that the fact that private contracts would be impaired by the enforcement of the prohibition laws was not a valid objection, the court saying:

> "By similar means, any man might forestall legislation, and fasten upon any community the endurance of the presence of the most decidedly hazardous occupation for an indefinite number of years."

In **P. B. & W. R. R. Co. v. Schubert**, 224 U. S., 603, the court said (p. 613):

> "The power of congress, in its regulation of interstate commerce, * * * to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. To subordinate the exercise of the federal authority to the continuing operation of previous contracts, would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals, and to withdraw from the control of congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements. The constitution recognizes no such limitation."

But are the contracts pleaded here of such nature that their obligations could in any way be violated by the legislation complained of?

It is only the legally enforceable obligation which one of the contracting parties owes to the other that is within the protection of the constitutional provisions to which reference is made above.

Sturges v. Crowinshield, 4 Wheat., 122.
Hunt v. Hunt, 97 U. S., 444.

It is clear that the parties themselves must be bound and that an obligation must exist not only in form, but in fact. The inhibition runs not against the impairment of contracts, but of their obligations.

The contracts in question might be terminated by either party upon thirty days notice to the other. The only period during which the liability company was obligated, if it chose to release itself, was for the first thirty days, because it had a right to cancel its contracts by giving notice for that length of time. The plaintiffs in error, who complain that the law relieved the liability company from its obligations to them, forget that long ago it might have absolved itself from its contract. If it had

a year ago notified plaintiffs in error that it declined to go on with the arrangement, there was no law in existence which would have compelled it to have done so. The legislation complained of did not interfere with the contractual rights of these parties and give one of them opportunity to be relieved, which it did not already possess. The objection is in reality not that the legislature did anything to impair the obligation of the contract, but that it prevented the making of contracts which the parties desired to make. This question has already been sufficiently discussed.

In **Northern Michigan, etc., Telephone Co. v. People's Mutual Telephone Co.**, 119 N. E., 212, the Supreme Court of Indiana held that an exclusive contract between a local and long distance telephone company, which could be terminated on thirty days notice by either party, was not good ground for a permanent injunction against enforcement of an order of the public service commission that another local competing company, with fifteen hundred subscribers, would be allowed to connect with the long distance company. The court said (p. 214):

> "Such contracts, as between the parties thereto, may or may not be valid, but, if valid, they do not prevent the state from exercising its power to provide for the welfare of the people, even though such provision may render such contracts partially or wholly ineffective."

The invitation to this court by plaintiffs in error to pronounce unconstitutional a piece of legislation because it declares invalid contracts which the other party could have avoided at any time, seems hardly to warrant consideration. And when it appears that those contracts were made with full knowledge that the people had conferred upon the legislature the right to require compulsory payments to a state fund and to put an end to all indemnity agreements, further argument ought not to be necessary.

V.

The Common Law Right to Insure or Seek Indemnity Must Give Way Where it Conflicts with the Constitutional Provision Authorizing a Compulsory Compensation System and Legislation Authorized by Such Provision.

It is urged vigorously by counsel for plaintiffs in error that the legislature cannot prevent employers from taking indemnity insurance outside of the state or declare invalid existing contracts so made. We shall not comment upon counsel's authorities cited on this phase, but simply observe that if the legislature may constitutionally say that an employer must either contribute to the state fund or agree not to take indemnity, the controversy is ended. The evil of carrying indemnity, which the legislature intended to remedy, is not lessened by the fact that the insurance contract may be written outside of the state. Nor is it sought to give these acts in question any extra territorial jurisdiction. The legislature of Ohio has said that certain employers, if they desire to carry on business in the state, must do one of two things. But they cannot employ more than five workmen in Ohio, carry their own risk and take indemnity. They may do so in other states if they choose. They may contract for all the indemnity insurance they desire, but if they do, they must either carry on their business outside of Ohio or pay directly into the compensation fund. The question is not, therefore, one of regulating contracts made out of the state, but of protecting the citizens of Ohio against an evil which the legislature conceived needed a remedy.

Here may be noticed the contention that the plan of workmen's compensation, as operated under the law of Ohio, is not insurance and does not indemnify the employer against liability. **Section 1465-70, G. C.**, provides that employers who pay into the fund or carry their own risk, as provided in section 1465-69, shall not be liable to respond in damages at common law or by statute, save as otherwise provided. **Section 1465-72** provides for the disbursement of the state fund to employes of employers who have paid their premiums and by employers who have elected to compensate their injured employes directly. It declares that such payment or payments to such injured employes, or to their dependents in case death has ensued, shall be in lieu of any and all rights of action whatsoever against the employer of all such injured or killed employes.

The exceptions referred to in section 1465-70, G. C., are cases where the injury has arisen from the willful act of the employer or his officers or agents or from his or their failure to comply with the lawful requirements for the protection of the lives and safety of employes. In such event the injured person has the option to sue at law or accept compensation as provided in the act. As will be seen from a study of counsel's brief, there is no contingency against which the employer is not protected, except where the act is willful or some provision of law for the safety of his employes has been violated. In other words, if he does not have full indemnity, it is because he is a law violator, and the court ought not to listen with much favor to the suggestion that he ought to be allowed to indemnify himself so that he may safely violate the law.

Section 1465-101, G. C. (103 O. L., 91) has been already quoted.

The Supreme Court of Ohio, in **State v. Employers' Liability Assurance Corp.**, 95 O. S., 289, in construing this section, said at p. 290:

> "The contract of indemnity shall not contain any agreement to indemnify an employer for any civil liability for or on account of the injury to his employe by the wilful act of such employer, or any of such employer's officers or agents, or the failure of such employer, his officers or agents, to observe any lawful requirements for the safety of employes."

So then in reality there was no provision for indemnifying an employer, who carried his own risk by the consent of the commission, from the consequences of his willful or unlawful acts.

VI.

Indemnity Contracts, in Existence at the Time of the Amendments Complained of, are not Exempt From Their Provisions.

Our argument has proceeded upon the hypothesis that these amendments are not unconstitutional, although they apply to existing contracts. Do they have such application? Counsel for plaintiffs in error urge vigorously the rule that in cases of doubtful interpretation a prospective meaning should be given to the statute. There is such a rule of construction and it has been properly applied in cases commented upon by counsel. But the cardinal rule is to determine the intention of the legislature.

The petition advises that there are more than six hundred and seventy-five employers in Ohio who have contracts substantially the same as those of plaintiffs in error. Is there any good reason why this large number should be permitted to go on in the pursuit of a course which the legislature concluded was against public wel-

fare? It seems that if an exception was to have been made in favor of these six hundred and seventy-five employers, it would appear in the statute. Now, what is the language? Note in section 1465-69, G. C., that premiums shall be paid during the month of January. There is a proviso which relates to employers who desire to pay compensation directly. To this a finding by the Industrial Commission is a prerequisite. As the section stands as amended, there must be comprehended in the finding the fact that such employers do not desire to indemnify themselves. In others words, such fact must be found to exist before the proviso operates.

Section 1465-70, to which reference was above made, was not amended with section 1465-69, but contains this language:

> "Employers who comply with the provisions of the last preceding section shall not be liable," etc.

In other words, to be free from liability under section 1465-70, G. C., as it stands, the employer must have complied with section 1465-69 as it stands.

Section 1465-101, G. C., in the form above quoted, was repealed and the section as it now stands enacted. The language is in part:

> "All contracts and agreements shall be absolutely void and of no effect which undertake to indemnify or insure an employer * * * or which provide that the insurer shall pay such compensation, or which indemnify the employer," etc.

If the statute was to be prospective in its operation, the language would have forbidden the making of such contracts, rather than to declare the contracts void. The important verbs in the section are in the present tense, viz., "undertake," "insure" and "provide." The title of the act is also persuasive:

> "To amend section 1465-101 of the General Code of Ohio, making void contracts indemnifying employ-

> ers against loss or liability for the payment of workmen's compensation, and agreements to pay such compensation, and making void contracts which indemnify the employer against damages when injury, disease or death arises from failure of employer to comply with lawful requirements for the protection of the lives, health and safety of employes, or when the same is occasioned by the wilful act of the employer or any of his officers or agents; prohibiting the issuance of licenses to enter into such contracts; and to repeal original section 1465-101 of the General Code of Ohio."

Certainly this language indicates an intention to invalidate all existing contracts of the nature described. The statute is not retroactive in the sense that it affects any rights which a policyholder may have acquired against the liability company prior to its passage. It simply provides that further rights shall not attach under such contracts.

The case is on all fours with **P. B. & W. R. R. Co. v. Schubert**, 224 U. S., 603, where the following language from the federal employers' liability act was under consideration (p. 608):

> "That any contract, rule, regulation, or device, whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, **shall to that extent be void.**"

This court said (p. 613):

> "It is also insisted that the statute does not cover the agreement in this case, as it was made before the statute was enacted. But that the provisions of section 5 were intended to apply as well to existing, as to future, contracts and regulations of the described character cannot be doubted. * * * Only by such general application could the statute accomplish the object which it is plain that congress had in view."

Perhaps no better expression of the purpose which the legislature had in mind, to protect those who are ignor-

ant of their own rights and unprepared to deal on equal terms with the trained representatives and adjusters of liability companies, could be found than the language used by the Supreme Court of Missouri in **State v. Railroad,** 242 Mo., 339, at p. 361:

> "Ever since the hungry Esau sold his birthright for a 'mess of red pottage' (Gen. 25:32), men, in rapidly increasing numbers have, when weak from lack of food, been willing to enter into any contract which seemed likely to put bread in their mouths or supply the immediate wants of their families.
>
> According to the logic of those cases upon which defendant mostly relies, constitutions were intended to serve as chains or shackles upon the people of the State, to prevent them from enacting such laws as will abridge the right of the cunning or powerful to oppress the weak."

Respectfully submitted,

JOHN G. PRICE,
Attorney General of Ohio.

B. W. GEARHEART,
Special Counsel.

APPENDIX A.

Frank S. Thornton v. Thomas J. Duffy and Herbert L. Eliot.

1. The enactment of the Workmen's Compensation Law (103 O. L., 72-92), did not exhaust the authority conferred upon the general assembly of Ohio by Section 35 of Article II of the Constitution. On the contrary, it has the right to amend or repeal all or any portion thereof at any time it deems proper.

2. Contracts of indemnity entered into between an employer of labor and an insurance company since the adoption of Section 35 of Article II of the Constitution are subject to the exercise by the general assembly of the power so conferred upon it to compel all employers of labor to contribute to the state insurance fund, or to impose further conditions or restrictions upon the privilege of electing to pay compensation direct.

3. The act of March 20, 1917 (107 O. L., 157, 159), amending Section 1465-69, General Code, is a valid and constitutional exercise of the authority conferred upon the General Assembly of Ohio by Section 35 of Article II of the Constitution of Ohio, and applies to all employers of labor mentioned in Section 1465-60, General Code.

(No. 15999—Decided December 31, 1918.)

Error to the Court of Appeals of Franklin County.

The petition of Frank C. Thornton avers that he has in his employ more than forty workman and operatives, regularly employed in the same business in and about his manufacturing establishment under contracts of hire.

That the defendants, Thomas J. Duffy and Herbert L. Eliot, are the duly appointed and qualified members of the Industrial Commission of Ohio; that there is a vacancy in the Commission, and that the two persons named are the only members of the Commission at the time of the filing of the petition.

That in January, 1914, upon evidence duly submitted, the Industrial Commission of Ohio made its finding of facts, certifying that plaintiff was of sufficient financial ability and credit to render certain payments in compensation to injured employes and dependents of killed employes, and the furnishing of medical, surgical, nursing and hospital attention, services and medicine and funeral expenses equal to or greater than is provided in the act of the general assembly passed February 26, 1913.

That thereupon he gave bond with security approved by the Commission, and paid the amount required into the state insurance fund, to be credited to the surplus provided for in paragraph 2 of Section 1465-69 of the General Code of Ohio, and thereupon elected to pay individually such compensation and furnish such medical, surgical, nursing and hospital services and attention and funeral expenses directly to the injured and dependents of the killed employes of plaintiff, as provided in Section 1465-69, General Code, and has since that time continually abided by the rules of the Industrial Commission of Ohio, maintained required bond and paid the required amount at its maturity credited to such surplus.

That since January, 1914, he has been and is now of sufficient financial ability and credit to render certain the payments of such compensation, and that the Commission has not at any time changed, modified or revoked its finding of fact, and the same is in full force and effect.

That in January, 1914, he made and entered into a written contract with the Aetna Life Insurance Company of Hartford, Connecticut, wherein the said company agreed to pay to the injured employes of plaintiff, such amount for medical, nursing and hospital services and medicine and such compensation as were and should be provided by Section 1465-41a and Section 1465-106, General Code and amendments thereof, to indemnify this

plaintiff against liability for the payment of any such amounts to injured employes or dependents of killed employes.

That the plaintiff agreed to pay the Aetna Life Insurance Company an estimated premium computed at an agreed rate upon the payrolls, of wages to be paid by plaintiff to his employes, from April 29, 1914, to April 29, 1915, and a like amount annually thereafter until the contract of insurance should be cancelled in accordance with the terms written therein.

That by the terms of said contract, either party thereto might cancel the same on and after thirty days' written notice to the other party of its intention to do so, but that otherwise the contract of insurance should continue in force indefinitely.

The petition also avers further facts in reference to additional premiums or rebates thereon, based upon the actual payment during the time the contract of insurance should be in force.

That on the first day of December, 1917, the defendants, Thomas J. Duffy and Herbert L. Eliot, then composing the Industrial Commission of Ohio, adopted a resolution reciting the act of the general assembly passed February 16, 1917, amending Section 1465-101, General Code, and the act of the General Assembly passed March 20, 1917, among other things amending Section 1465-69, General Code, and the act of the General Assembly of the State of Ohio passed March 21, 1917, amending Section 9367-2, paragraph 2, General Code, and declaring that no employer shall be permitted to pay or furnish directly to injured employes or the dependents of killed employes, the compensation and benefits provided in Sections 1465-41a to 1465-106, General Code, if such employer shall by contract or otherwise provide for the insurance of the payment by them of such compensation and benefits, or

shall indemnify themselves against loss sustained by the direct payment thereof, and that all authorization or findings of fact theretofore issued by the Commission authorizing and permitting such employers to pay or furnish such compensation and benefits direct, shall be and stand revoked of January 10, 1918, as to all employers receiving such authorization who on the date of January 10, 1918, carry any such insurance.

That the Industrial Commission threatened to and will, unless restrained by the order of this court, send such notices and revoke and hold for naught the findings of fact so made and certified to this plaintiff and upon which plaintiff made his election to pay and furnish such compensation direct.

The petition further avers that the contract of plaintiff with the Aetna Life Insurance Company is a valid and subsisting contract. That plaintiff has the right to maintain the same until it shall be cancelled, as provided by its terms, and that the revocation of the finding of facts so certified by the Commission to plaintiffs and the refusal of the Commission to make and certify to plaintiffs its findings of fact as provided in Section 1465-69, will cause plaintiff irreparable injury and damage, for which he has no adequate remedy at law.

The petition further avers that there are more than six hundred and seventy-five employers of labor similarly situated, and many other employers who claim the right to make such contracts of indemnity; that it is impractical to bring them all before the court, and plaintiff sues for the benefit of all such employes.

That the several acts mentioned in the resolution adopted by the Industrial Commission of Ohio on December 1, 1917, have no application to contracts of insurance or indemnity existing when these acts took effect, and were not intended, and do not authorize the employer

or the Commission to refuse, revoke or cancel the authorization of employers to pay direct the compensation and benefits provided by law for employes and their dependents, and that if said acts do apply to such contracts, they are in contradiction of Section 1 of Article XIV and Section 10 of Article I of the Constitution of the United States, and Section 28 of Article II of the Constitution of Ohio, and plaintiff prays that the Industrial Commission of Ohio be perpetually enjoined from sending said notices, and from revoking, changing, or modifying such findings of fact made and certified by the Commission to plaintiff, and from carrying out and perpetuating the resolution of December 1, 1917, and from revoking, changing or modifying its findings of fact for and on behalf of any employer who is of sufficient financial ability and credit to render certain the payment of compensation and furnishing the services to employes and their dependents as provided in Section 1465-69, General Code, and who maintain bond required by the Commission and abide by its rulings and pay the required amount into the surplus of the state insurance fund, and for such other and further relief to which he may be entitled.

The answer and cross-petition of The Cleveland Stamping & Tool Company avers similar facts, and prays for the same relief.

To the petition of plaintiff and to the answer and cross-petition of The Cleveland Stamping & Tool Company, the defendants filed general demurrers, which were sustained by the Common Pleas Court. The cause was appealed to the Court of Appeals of Franklin county, Ohio, which court held that the plaintiff was entitled to a temporary restraining order enjoining the defendants as prayed for in his petition until the twenty-ninth day of April, 1918, and upon the facts stated in the petition was not entitled to a perpetual injunction, and sustained the demurrer to

the answer and cross-petition of The Cleveland Stamping & Tool Company.

This proceeding in error is brought in this court to reverse the judgment of the Court of Appeals.

Mr. Judson Harmon and Messrs. Vorys, Sater, Seymour & Pease, for plaintiff in error.

Mr. Joseph McGhee, attorney general; Mr. William J. Ford, Mr. Frank Davis, Jr., Mr. Timothy S. Hogan and Mr. George B. Okey, for defendants in error.

Donahue, J.:

Section 35 of Article II of the Constitution of Ohio, as adopted September 3, 1912, authorizes the General Assembly of Ohio to pass laws establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, for the purpose of providing compensation to workmen and their dependents, for death, injury, or occupational diseases occasioned in the course of such workmen's employment.

In pursuance of this authority, the General Assembly enacted a Workmen's Compensation Law (103 O. L., 72-92). Section 22 of this act (Section 1465-69, General Code), provided among other things, that certain employers under certain conditions, might elect to pay individually, or from a benefit fund, department or association, compensation to workmen and their dependents for death, or injuries received in the course of their employment.

Under the provisions of Section 35 of Article II, Constitution, the General Assembly was not required to make any such exception in favor of any employer, but could have required every employer mentioned in sub-division 2 of Section 13 of that act, to pay into the state insurance fund, the amount of premium determined and fixed by the State Liability Board of Awards; and if it could have done this, then undoubtedly it can at any time amend Sec-

tion 22 of that act by striking out such exceptions in favor of employers of sufficient financial ability to render certain the payment of compensation to injured employes or to the dependents of killed employes, and the furnishing of medical, surgical, nursing and hospital attention and services, medicines and funeral expenses equal to or greater than provided in the original act.

It necessarily follows that if the General Assembly has the power at any time to withdraw from these employers this privilege to elect to pay such compensation and furnish such services and attention and funeral expenses directly, it can from time to time impose such conditions as in its judgment seems wise and necessary to safeguard the main purpose and intent, not only of the act itself, but of the constitutional provision under authority of which this law was passed.

It also follows that whoever seeks to avail himself of the benefits of this exception in his favor, must comply with the conditions imposed. Verducci v. Casualty Company of America, 96 Ohio St., 260.

While the contract of insurance described in the petition does not provide for any definite term, nevertheless, at the time it was made, it must have been within the contemplation of the parties thereto that they could not by contract limit the power of the general assembly conferred upon it by Section 35, Article II of the Constitution, to withdraw this privilege or to limit it by other and further conditions that would render such contract of indemnity wholly useless to the employer.

The question is in every way analogous to the question arising in the case of Louisville & Nashville Ry. Co. v. Hottley, 219 U. S., 467, in which case it was held by the Supreme Court of the United States that, "That power of Congress to act in regard to matters delegated to it is not hampered by contracts made in regard to such matters

by individuals, but contracts of that nature are made subject to the possibility that, even if valid when made, Congress may exercise its power to render them invalid." To the same effect is the decision of the Supreme Court of Vermont in the case of Fitzgerald v. Grand Trunk Ry. Co., 63 Vt., 169. See also Boyd v. Alabama, 94 U. S., 645; Beer Co. v. Massachusetts, 97 U. S., 25; Stone v. Mississippi, 101 U. S., 814; Butchers' Union Co. v. Crescent City Co., 111 U. S., 746, and Railroad Company v. Nebraska, 107 U. S., 58.

But the question in this case does not depend merely upon the general authority of the legislature to exercise police powers, but rather directly upon the constitutional grant of power and the further consideration that the privilege granted to certain employers by Section 22 of the Workmen's Compensation Act, to pay compensation direct, is an exception to the general provisions of that act in his favor.

There is therefore no reasonable hypothesis upon which to base the theory that a private contract to continue for an indefinite number of years, could in any way prevent the legislature from withdrawing this privilege or adding other and further conditions.

There is, however, a further provision in Section 22 of the original act, that seems to have been overlooked in the argument of this case. That provision reads as follows: "The Industrial Commission of Ohio may at any time change or modify its findings of fact herein provided for, if in its judgment such action is necessary or desirable to secure or assure a strict compliance with all of the provisions of the law in reference to the payment of compensation and the furnishing of medical, nurse and hospital services and medicines and funeral expenses to injured and dependents of killed employes."

The experience of four or more years under this Workmen's Compensation Law may have demonstrated to the

entire satisfaction of this commission that it is necessary or desirable to change or modify its former findings of fact in order to secure or assure a strict compliance with the law, where employers have elected to pay this compensation direct, and have later entered into a contract with an indemnity company, by the terms of which, as averred in this petition, "The insurance company * * * agrees to pay to the injured employes of plaintiff, such amounts for medical, nurse and hospital services and medicine and such compensation as has and should be provided by said act of the General Assembly comprised in Section 1465-41a to Section 1465-106, General Code of Ohio, and amendments thereto, and in the event of death of any of plaintiff's employes, such amounts as were or should be provided in said acts and amendments thereof for funeral expenses and for compensation to the dependents of those partially dependent upon such employes."

While Section 54 of the Workmen's Compensation Law, (Section 1465-101, General Code), as it read prior to the amendment of February 16, 1917, undoubtedly permitted the writing of such a contract, nevertheless, that section must be construed in connection with Section 22 of the same act, which authorizes the Industrial Commission to change or modify its findings of fact provided for in that section, whenever in its judgment such action is necessary or desirable to secure or assure a strict compliance with all the provisions of that act.

It therefore follows, that if the Industrial Commission should find that such contracts furnish an opportunity for unfair or fraudulent settlement, and had resulted or might result not only in avoiding a strict compliance with the provisions of the act, but also in some instances defeat its intent and purpose, especially where the injured employe or the dependents of an employe killed in the course of his employment are not fully ad-

vised of their rights under Section 27 of this act and Rule 18 adopted by the Industrial Commission under authority of the act creating that Commission, it would have the power under this provision of Section 22 to change or modify its former findings of fact in reference to employers who had elected to pay individually from a benefit fund, department, or association such compensation direct.

But the right of the Industrial Commission of Ohio to change or modify its former findings of fact, does not now depend upon this construction of this paragraph of Section 22. The amendment of March 20, 1917, of Section 1465-69, General Code, specifically limits the privilege of electing to pay compensation individually or from a benefit fund department or association, to those employers "who do not desire to insure the payment thereof or indemnify themselves against loss sustained by direct payment thereof," and therefore it becomes the duty of the Industrial Commission of Ohio to change or modify its former finding of fact in reference to such employers, and make the same conform to the provisions of the amended section.

This added condition precedent to the exemption of certain employers from the general provisions of the act, is not only clearly within the power of the General Assembly, but it is in furtherance of the purpose and intent of the constitution and the law, to create and maintain one insurance fund, to be administered by the state, out of which fund compensation shall be paid to workmen and their dependents for death, injuries, or occupational diseases occasioned in the course of employment.

If insurance is desired, the state will furnish it out of the fund created and maintained for that purpose, for it would not only be arbitrary, unfair, and without purpose, to permit some employers of labor to enter into contracts

of insurance with private companies, and compel all other employers to contribute to the state insurance fund, but it would also hinder, and perhaps utterly demoralize the method and defeat the object and purpose of the creation of such a fund.

This is an action to enjoin the Industrial Commission of Ohio from revoking, changing or modifying its findings of fact heretofore made by it in reference to the right of this plaintiff and the cross-petitioner to elect to pay compensation direct. Therefore, the question of the constitutionality of Section 1465-101, General Code, as amended February 16, 1917, or the constitutionality of paragraph 2 of Section 9507-2, General Code, as amended March 21, 1917, is in no wise important in the disposition of this case. If Section 1465-69, General Code, as amended March 20, 1917, is a valid and constitutional act of the General Assembly of Ohio, and applies to all employers of labor mentioned in subdivision 2 of Section 13 of the Workmen's Compensation Act, then the Industrial Commission not only has authority, but it becomes its duty to require all employers of labor to bring themselves within the terms and conditions before permitting them to exercise the privilege of election, regardless of the constitutionality of the acts above mentioned.

Judgment affirmed.

Nichols, C. J.; Wanamaker, Newman, Jones, Matthias and Johnson, JJ., concur.

APPENDIX B.

In the Court of Appeals of Franklin County, Ohio.

Frank D. Thornton, Plaintiff, vs. Thomas J. Duffy, Herbert L. Eliot, Members of and Composing the Industrial Commission of Ohio, Defendant. No. 599.

Decision

Rendered on the Eighteenth Day of May, 1918.

By the Court: This action involves the validity and construction of Section 1465-101, G. C., as amended February 16, 1917, (107 Ohio Laws, p. 7), making void all contracts to indemnify or insure an employer against liability under the Workmen's Compensation Act, and also the validity and construction of Section 1465-69, G. C., as amended March 20, 1917, (107 Ohio Laws, p. 159), prescribing the conditions under which the employers may directly compensate their injured employes.

The plaintiff alleges that he is an employer within the purview of the Workmen's Compensation Act, and prior to the passage of the acts under consideration had complied with the provisions of the Workmen's Compensation Act and was authorized to furnish direct compensation to his injured employes.

He further alleges that prior to the passage of the acts under consideration he entered into an indemnity contract with the Aetna Life Insurance Company of Hartford, Connecticut, whereby said company agreed to indemnify plaintiff and pay such compensation as might be awarded under the Workmen's Compensation Act.

The petition alleges that plaintiff agreed to pay said company a cash premium and further agreed to pay such company on April 29th an estimated premium at an agreed rate upon the estimated pay roll of wages

from April 29, 1914, to April 29, 1915, and a like amount annually thereafter until said contract was canceled in accordance with certain provisions in the contract.

The petition alleges that the defendants are about to revoke the authority of plaintiff to furnish direct compensation to his employes upon the sole ground that said plaintiff is carrying indemnity insurance.

The petition asks for an injunction against the Industrial Commission to prevent said commissioners from revoking the plaintiff's authority to carry industrial insurance or furnish direct compensation to his injured employes.

The Cleveland Stamp & Tool Company have filed a cross-petition containing similar averments and raising similar questions.

The case has been submitted upon demurrers to the petition and cross-petition.

Exhaustive briefs have been submitted by counsel and very helpful oral arguments have also been presented.

We shall merely announce the conclusion at which we have arrived after a careful consideration of the briefs and arguments of counsel.

We think under Section 35, Article 2 of the Constitution the legislature has been invested with broad powers over the subject of workmen's compensation.

The legislature might have conferred the entire jurisdiction over the subject of workmen's compensation upon the Industrial Commission, but having provided for a system of direct compensation by employers, such employers must bring themselves within the provisions of the act in respect thereto.

The insurance companies are not parties to the action but the employer claims a constitutional right to obtain insurance against liability under the direct compensation provisions of the act.

The question is not free from doubt, but we have reached the conclusion that the amendment of Section 1465-69, G. C., including among other conditions the provision that the employer does not desire indemnity insurance, does not violate any provisions of the state or federal constitution and falls within the general scope of the power conferred upon the legislature under Section 35, Article 2 of the state constitution.

We think that a reasonable construction of the acts under consideration is that they were intended to apply to the future and would not therefore interfere with the valid contracts and obligations in existence at the time the amendment became effective.

The cross-petition of the Cleveland Stamp & Tool Company shows that its contract with the insurance company took effect March 1, 1914, and was continued by annual payments up to March 1, 1918.

Plaintiff's contract with the insurance company began April 29, 1914, and has been continued by annual payments up to April 29, 1918.

These contracts were indefinite as to duration and were therefore only effective as legal obligations from year to year.

When the new year begins the employer by the payment of the annual premiums for all practical purposes made a new contract. See decision of Supreme Court in case of Kelly vs. Carthage Wheel Co., 62 O. S., 598.

The renewal of the policy of the Cleveland Stamp & Tool Company on March 1, 1918, would be subject to the provisions of the amendments under consideration, and its cross-petition having been filed on April 9, 1918, it is clear it is not entitled to relief by way of injunction against the enforcement of such amendments.

The demurrer to the cross-petition should be sustained.

The plaintiff renewed his insurance on April 29, 1917, and was therefore operating under a contract in force at the time the amendments under consideration became operative.

The petition of plaintiff was filed December 14, 1917, and he was entitled to protection against the revocation of his right to furnish direct compensation up to April 29, 1918, and as to his petition we think the demurrer should be overruled—that is at the time of the commencemen of this suit the plaintiff was entitled to an injunction to prevent interference with the right to furnish direct compensation to his injured employes during the renewal of his insurance ending April 29, 1918.

The demurrer is therefore not well taken as to the petition.

If final judgment is rendered upon the petition it is evident that a perpetual injunction should not be allowed.

The only relief plaintiff would be entitled to would be a finding in his favor that the temporary injunction was properly granted and a judgment for costs.

If the case is finally disposed of this court will continue the temporary injunction for ten days from the approval of the entry in order to preserve the status until application can be made to the Supreme Court.

Judgment accordingly.

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APPENDIX C.

In the Court of Common Pleas, Franklin Co., O.

Frank C. Thornton, Plaintiff, vs. Thomas J. Duffy et al., Defendants. No. 76276.

Decision

of Hon. Marcus G. Evans, Judge, rendered on the eighteenth day of April, A. D., 1918.

This action seeks a perpetual injunction against the members of The Industrial Commission of Ohio.

Plaintiff is an employer of labor subject to the provisions of the employer's liability act of this state. In 1914 under the amendment of 1913 of Sec. 22 of said act (103 O. L. 79), said Commission made its finding of facts and certificate to plaintiff, and plaintiff made his election to pay direct the compensation and benefits to injured employes and dependent beneficiaries as in the act provided, and has since and is continuing so to do. Under said act an employer of labor has the option either to pay into the state insurance fund, or to pay direct to his injured employes or to their dependent beneficiaries upon the necessary finding of facts, and certificate of the Commission, and giving the bond, and performing all the other conditions required by the act. Immediately following such election to pay direct instead of into said fund, the plaintiff contracted with the Aetna Life Insurance Company for indemnity insurance, and said company agreed to indemnify plaintiff against his liability for the payment for any such compensation, benefits and expenses as provided in said act and the amendments thereof.

Said contract of insurance contains no provision for lapse or forfeiture of the same, or of any of plaintiff's rights thereunder for non-payment of any premiums due

thereon. It is an indeterminable contract, other than that it provides that either party upon thirty days written notice to the other party may effect cancellation of the policy of insurance.

Said insurance company was duly licensed to transact business in Ohio, and at the date of said contract authorized to indemnify employers against loss or damage for personal injuries as then provided in Sec. 9510 Code.

In 1917 said legislative act was amended. Said Sec. 22 now designated in the Code as Sec. 1465-69 (107 O. L. 159), is so amended that in addition to the necessary facts and requirements provided in the amended act of 1913, the amendment of 1917 provides that such employers "who do not desire to insure the payment thereof or indemnify themselves against loss sustained by direct payment thereof, may upon a finding of such fact by the Industrial Commission of Ohio, elect to pay individually such compensation * * * to such injured employes or the dependents of such killed employes."

Also, the original Sec. 54, being Code Section 1465-101, was also amended in 1917, (107 O. L. 7), and provides that "all contracts and agreements shall be absolutely void and of no effect which undertake to indemnify or insure an employer against loss or liability for the payment of compensation to workmen for injury, or to their dependents for death. * * * or which provides that the insurer shall pay such compensation, or which indemnify the employer against damages. * * * No license or authority to enter into any such agreement or issue any such policies of insurance shall be granted or issued by any public authority."

Also, by the amendment of Sec. 9007-2 Code (107 O. L. 647), said act now provides for the exclusion of workmen's compensation in liability insurance.

The petition alleges that the Industrial Commission has passed a resolution to the effect that no such employ-

ers shall be permitted to pay direct to injured employes or their dependents compensation or benefits under said act, if such employers contract for the insurance of payment to themselves of such compensation and benefits, or shall indemnify themselves against loss sustained by the direct payment thereof, and that the Commission is threatening to give notice of the passage of such resolution, and to revoke all authorizations or findings of facts heretofore issued by the Commission permitting such employer to pay direct if they contract to indemnify themselves against such loss.

The plaintiff alleges that its said contract of insurance is a valid, subsisting contract, and that he has the right to continue said contract until the same be cancelled as therein provided by one of the parties thereto; that he has the right to cancel said contract, and make contracts of insurance with others to indemnify him against such loss or liability.

He avers that the legislative act of 1917, amending Secs. 1465-101, and 1465-69, were not intended to and do not apply to contracts of insurance or indemnity existing when said acts took effect, or to such contracts with individuals, and were not intended to and do not authorize said Commission to refuse, revoke or cancel authorization of employers to pay direct such compensation and benefits upon finding by said Commission that such employers desire to so insure.

And avers that if said acts and said resolution and notices were so intended to apply, then that such are unconstitutional and void, in that they contravene Art. 14, Sec. 1 and Art 1, Sec. 10 of the constitution of the United States, and Art 1, Sec. 1, Art. 1, Sec. 19, and Art 2, Sec. 28 of the constitution of Ohio.

Plaintiff prays for a perpetual injunction to enjoin the members of said commission from sending out said no-

tices, and from revoking said findings of facts, and from carrying out and effectuating said resolution.

Do said amended acts of 1917 apply to existing contracts for such indemnity insurance? If so, is said amended act unconstitutional and void?

It is the contention of counsel on behalf of the demurrer to the petition that by the amendment of 1917, to said act, insurance companies were prohibited from transacting the business of writing liability insurance to employers who had elected to carry their own insurance; that all such contracts then in existence were made void; that this action of the legislature is a valid exercise of the police power; that by the amendment of said Sec. 2, if plaintiff elects to take advantage of the privileges offered therein he must comply with the conditions upon which such privileges are offered; that the character of the contracts pleaded by plaintiff are not existing indeterminate contracts, but run from year to year, and when an annual premium is paid, a new contract for another period is made; that the last premium paid was made after said amendments and that plaintiff in attempting knowingly to prolong an illegal contract when such payment is made.

It is also claimed on behalf of the demurrer, that no vested rights have been impaired by said legislation, and that said amended act is supported by the organic law of the state, and by the decided cases, and invalidates all such existing contracts, and prohibits all such future contracts.

It is the contention of counsel for plaintiff that said amendments do not declare that the prohibition shall extend to existing contracts; that they refer in langnage to future contracts, not contracts already made; that it requires strained effect in order to construe said sections to apply to existing contracts; that if the language is am-

biguous they could only apply to future contracts, and cannot have retrospective application unless it is held that the legislature has so explicity expressed its intention.

Also, that said amendment of 1917 are unconstitutional as to prohibiting employers making indemnity contracts; that the legislature cannot prohibit insurance; nor, compel a sacrifice of indemnity insurance as a condition to the employer's right to pay compensation directly; that the desire for indemnity insurance can not be made the sole basis of a legislative classification of employers, distinguishing them, as ineligible to pay compensation directly; that such classification is not related to the purpose of the constitutional amendment of the compensation law, and is arbitrary and said act is unreasonable, unconstitutional and void.

That as the legislature cannot prohibit employers making insurance contract; it cannot annul existing contract. In brief, the above are the leading claims of the respective parties on this demurrer.

The questions here presented by reason of their importance have been very fully and ably argued by counsel, and a great many authorities are cited.

I have examined all of them, but it will not be necessary in the opinion to review them, other than such as, in my opinion, control in determining the issues.

I think there is no doubt but that, under the authorities in this state, the subject matter in said act and the amendments are such, that justifies the conclusion that said act was passed in the exercise of the police power.

Such was so expressly held by our Supreme Court in State ex rel. vs. Creamer, 85 O. St., 391, wherein the court say that it is clear that the objects and purposes which the legislature contemplated in the passage of the law in question are sufficient to sustain the exercise of the police

power, and the participation of the state in the manner provided. The court further say in that case that "in a general way the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

Citing Canfield vs. U. S., 167 U. S., 518.

It is not necessary to cite further authorities on this phase of the case, for I think it is clear, that said act was passed in the exercise of the police power.

Are said amendments intended to and do they effect existing contracts of insurance to such employers?

Since the adoption of Sec. 35 of the constitution in 1912, and the legislative amendment of Sec. 1465-69 of 1913 (103 O. L. 79), said workmen's compensation law has been compulsory. Since then all employers of labor in this state employing five or more workmen or operatives regularly in the same business or in or about the same establishment under any contract of hire, express or implied, are within the compulsory provisions of said act.

The amendment of 1917 retains a classification of employers, in that by complying with the required provisions an employer may elect to pay into the state insurance fund the amount of premium determined and fixed by the Industrial Commission, or, he may elect to pay individually such compensation to his injured employes and their beneficiaries directly, which shall in no event be less than that paid or furnished out of by the state insurance fund, in similar cases, to injured employes or to their dependents by such as contribute to said fund.

By Section 35 of the Constitution laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the State, determining the terms and conditions upon which payments shall be made therefrom.

Under the above provisions of the Constitution the Legislature had full power to repeal the provisions of such election, and to require all such employers of labor to pay such premiums into the State Insurance Fund, and to deny the right of election to pay direct to any such injured employes or their beneficiaries. The Legislature by the amendment of 1917, did not see proper so to do, but exercised the option to retain such election, with the addition of a material requirement on the part of any such employer as desired to elect to pay direct instead of paying into the State Fund.

By the amendment of 1917 of Section 1465-69, it is provided that such employers * * * who do not desire to insure the payment thereof, or indemnify themselves against loss sustained by the direct payment thereof, may, upon a finding of such fact by the Industrial Commission of Ohio, elect to pay individually such compensation. By this provision an entirely new requirement is incorporated in said Workmen's Compensation Law.

The law further provides that said Commission shall make and publish rules and regulations governing the mode and manner of making application, and the nature and extent of the proof required to justify such findings of fact by said Commission as to permit such election by such employers. Also, that said Commission may at any time change or modify its findings of fact therein provided. Said Act does not in express terms provide that it shall apply to existing contracts of insurance. But the Act does provide as a condition for the right of election to pay direct, that employers shall not desire to insure the payment thereof or indemnify themselves against loss sustained by such direct payment. By the provisions of the Act, before the Commission will be justified in making a finding of fact and a certificate to such an employer desiring to pay direct, the Commission must find, in addi-

tion to the other conditions, that he must be such an employer of labor as does not desire to so insure. The Act being now compulsory as to all such employers, they must either pay the compensation into the Insurance Fund, or they must qualify under the statute to pay direct instead of paying into said fund. And by the provisions of said amended section of the statute they cannot so qualify unless they do not desire to so insure, nor could the Commission make the necessary finding of fact and certificate in the absence of such desire not to so insure.

By a reasonable construction of said amended Act, in connection with the other amendments above referred to, and of Section 35 of the Constitution, I am of the opinion that the legislative intent was that all such employers of labor in this state shall upon the taking effect of said amendment, elect either to pay into the Insurance Fund, or elect to pay direct upon complying with all the conditions therein prescribed, including that of not desiring to so insure, and thereby intended the Act to apply to any and all such existing policies of insurance. This is because said provision in the amendment would be rendered inoperative as to those who desire to pay direct if they could continue existing contracts of insurance.

The Supreme Court in State ex rel. vs. Employers Liability Assurance Corporation, 95 O. S., 289, decided in January, 1917, construed certain of the amendments of the Act of 1913. The constitutionality of Section 54 (1465-101) as amended in 1913, was before the court in that case on a demurrer to the answer. It seems at that time the contracts of insurance contained agreements to indemnify employers for civil liability for injury to employes by the willful act of the employer or his agents, or for his failure to observe any lawful requirement for the safety of employes. The court upheld the constitutionality of the Act as it then provided, but entered a

judgment of ouster as to the exercise of the franchise of writing indemnity insurance policies to employers other than those permitted by the court, and suspended the operation of ouster for one hundred days in order to permit respondent to conform to the holding.

The judgment in that case did affect existing contracts of insurance, so far as they embodied insurance to indemnify employers on account of injuries to employes by willful act of the employer or his agents, or such as were occasioned by the failure of the employer or his agents to observe any lawful requirements for the safety of the employe, and required all such policies to be reformed to conform to the judgment. The judgment was predicated upon the statute as it then provided. The amendments of 1917, providing that all such indemnity contracts of insurance shall be absolutely void, and providing for the additional condition upon which an employer may elect to pay direct, and providing that liability insurance shall not include workmen's compensation were not before the court in that case.

The judgment of ouster in the above case may have had a controlling influence to account for the absence of an express provision in the amendment of 1917 for its application to existing contracts of insurance.

The petition alleges that plaintiff in January, 1914, made and entered into his said contract of indemnity insurance with the said Aetna Insurance Company. This was after the original enactment of the said Workmen's Compensation Act, and was after the amendments of 1913 of said Act, and was after said Act and amendments were in effect and operation. In this connection, and in connection with the judgment that said Act is within the police power, I am impressed with the observations of the United States Supreme Court in Railroad vs. Mottley, 219 U. S., 467, wherein it held that under the Interstate

Commerce Act said existing contract was rendered invalid.

The court say:

> "The authorities support this view that, as the contract in question would have been illegal if made after the passage of the Commerce Act, it cannot now be enforced against the Railroad Company, even though valid when made. If that principle be not sound, the result would be that individuals and corporations could, by contracts between themselves, in anticipation of legislation, render of no avail the exercise by Congress to the full extent authorized by the Constitution, of its power to regulate commerce. No power of Congress can thus be restricted."

The court further say:

> "The agreement between the Railroad Company and the Mottleys must necessarily be regarded as having been made subject to the possibility that at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforcible, or to impair its value. That the exercise of such power may be hampered or restricted by contract previously made between individuals or corporations is inconceivable. The framers of the Constitution never intended any such things to exist."

The contract in question in that case was made several years before the passage of the Interstate Commerce Act, and was a valid Act, and was fully performed up to the passage of said Act. But because of the provision that after January first, 1917, no common carrier subject to the provisions of this Act shall directly or indirectly issue or give any interstate free tickets, free pass, or free transportation for passengers, the railroad company refused longer to perform on said contract, and this gave rise to said action and the decision of the Supreme Court that said Act invalidated said existing contract.

The Supreme Court of Ohio, in passing upon the constitutionality of Section 27 of said Act, in 95 O. S., 248, say:

> "The Act was passed in the exercise of the police power, fortified by the grant of power contained in the amendment to the Constitution in question, which in itself is but an assertion of the police power. It is an effort in some degree to meet the requirements of new conditions which have come in an age full of revolutionary changes in industrial methods."

Numerous decisions are cited from the U. S. Supreme Court, and from state courts, wherein it is held as to such acts within the police power apply as well to existing as to future contracts. The great weight of the authorities in my opinion uphold that doctrine in cases such as this.

The plaintiff cites, among other cases, State ex rel. vs. Creamer, 85 O. S., 349, decided in 1912, involving the constitutionality of the original act to create a state insurance fund for the benefit of injured employes, in which the court said in the opinion that "as to the suggestion that this statute impairs the obligations of contracts, it is sufficient to say that it can, of course, not effect contracts in existence and unexpired at the time it is put into operation by the employer." Since then Section 35 of the constitution has been adopted, also the said amendments of 1917 have been enacted, the effect and operation of which, in my opinion, do affect such existing contracts.

I am of the opinion that it is not necessary to comment further on the questions made, or to refer to the numerous decided cases cited. I have carefully examined all of them. Since the enactment of this and similar laws the weight of the authorities upholds in the great majority of cases the validity of such legislation. The general holding is that as such contracts are made within the rea-

sonable contemplation of such legislation and subsequent amendments thereto to conform to conditions effecting the desired purposes, that all such contracts as tend to the material impairment of the operation of such laws, are subject thereto, and if existing at the time of such legislation must be changed or ended, if necessary, to enable a full and complete operation of the law.

The act in question is not retrospective in a case such as this, and does not fall within that objection. It falls within a class of cases in which such contracting parties should reasonably have contemplated when so contracting, such legislation.

The act is not prohibitive of insurance other than such indemnity insurance, nor is it discriminating, nor can it be claimed to sacrifice insurance further than the requirement to conform to the law in that respect, and this is upheld by the weight of authorities.

The Cleveland Stamping and Tool Company, has since the argument, been made a party defendant, and has filed an answer and cross-petition, to which the other defendants herein have filed a demurrer. The answer does not take issue with the allegations of the petition, and the cross-petition sets forth substantially the same claims that are set forth in the petition. Counsel for all parties, including those for the cross-petitioner, have submitted the demurrer to the said answer and cross-petition on the argument and briefs made on the demurrer to the petition. The same questions of law are made and are involved in each.

It is the contention of plaintiff that since the legislature has repealed all regulations as to such indemnity insurance, that in the absence of laws requiring incorporation for the transaction of the business of insurance, that individuals are unrestrained in making insurance contracts with other individuals, and engaging in the busi-

ness of insurance. This is because, as claimed, that the right to make insurance is an inalienable right protected by the constitution. That the legislature cannot prohibit insurance, but may regulate it. It is the claim, in brief, that plaintiff being an individual, cannot be restrained by legislation from making indemnity insurance contracts.

I think it is not necessary to dwell at any length on this question. The Supreme Court has held in **Renschler vs. State**, 80 O. St., 366, that an insurance contract by an individual is subject to regulation by the insurance department; that even if individuals, acting as natural persons, can carry on the business of insurance, and exercise the functions of such, they must comply with all the laws of Ohio on the subject of life insurance; that it may well be questioned whether a franchise of this character which by its very nature presupposes perpetuity, could be granted to an individual.

Other authorities cited are also of similar import. I am of the opinion that all such parties to contracts of indemnity insurance, whether individuals or corporations, are subject to the provisions of said act and its amendments, and that the act is not invalid for the reason that it affects individuals in that regard. The demurrers of said defendants to the petition and to said answer and cross-petition are both sustained, and the restraining order heretofore issued is dissolved.

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Supreme Court of the United States

No. 920.

FRANK C. THORNTON AND THE CLEVELAND STAMPING & TOOL CO.,

Plaintiffs in Error,

vs.

THOMAS J. DUFFY AND HERBERT L. ELIOT, MEMBERS OF AND COMPOSING THE INDUSTRIAL COMMISSION OF OHIO,

Defendants in Error.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

It was sought in the courts below to enjoin the Industrial Commission of Ohio from putting into operation and execution two statutes passed by the General Assembly of the state at the legislative session of 1917.

The first of these (House Bill No. 1), passed February 16, 1917, approved February 19, 1917 (107 Ohio L. 6), including its title, is as follows:

"An Act."

"To amend Section 1465-101 of the General Code of Ohio, making void contracts indemnifying employers against loss or liability for the payment of workmen's compensation, and agreements to pay such compensation, and making void contracts which indemnify the employer against damages when injury, disease or death arises from failure of employer to

comply with lawful requirements for the protection of the lives, health and safety of employes, or when the same is occasioned by the wilful act of the employer or any of his officers or agents prohibiting the issuance of licenses to enter into such contracts; and to repeal original Section 1465-101 of the General Code of Ohio.

Be it enacted by the General Assembly of the State of Ohio:

Section 1. That Section 1465-101 of the General Code of Ohio be so amended to read as follows:

"Sec. 1465-101. All contracts and agreements shall be absolutely void and of no effect which undertake to indemnify or insure an employer against loss or liability for the payment of compensation to workmen or their dependents, for death, injury or occupational diseases occasioned in the course of such workmen's employment, or which provide that the insured shall pay such compensation, or which indemnify the employer against damage when the injury, disease or death arises from the failure to comply with any lawful requirement for the protection of the lives, health and safety of employes, or when the same is occasioned by the wilful act of the employer or any of his officers or agents, or by which it is agreed that the insuree shall pay any such damages. No license or authority to enter into such agreements or issue any such policies of insurance shall be granted or issued by any public authority."

The other act was amended Section 22 (Section 1465-69, General Code), of the Workmen's Compensation Act of 1913 (107 Ohio L. 159). The following is the amended portion thereof:

"Sec. 1465-69. * * * And provided, further, that such employers who will abide by the rules of the industrial commission of Ohio and as may be of sufficient financial ability to render certain the payment of compensation to injured employes or to the dependents of killed employes, and the furnishing of medical, surgical, nursing and hospital attention and services and medicines and funeral expenses, equal to or greater than is provided for in Section

1465-78 to 1465-89, General Code, **and who do not desire to insure the payment thereof or indemnify themselves against loss sustained by the direct payment thereof, may** upon a finding of such fact by the industrial commission of Ohio, elect to pay individually such compensation. * * *."

The black face portion indicates the amendment.

NO CONTRACTUAL OR VESTED RIGHTS HAVE BEEN IMPAIRED OR VIOLATED BY THE LEGISLATION IN QUESTION.

In the year 1912, the Constitution of Ohio was amended by the adoption of two new sections to Article II, of which the following are copies:

"Section 34. Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employes; and no other provision of the Constitution shall impair or limit this power.

"Section 35. For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto, by employers, and administered by the state determining the terms and conditions upon which payments shall be made therefrom, and taking away any or all rights of action or defense from employes and employers; but no right of action shall be taken away from any employe when the injury, disease or death arises from failure of the employer to comply with any lawful requirement for the protection of the lives, health and safety of employes. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto."

In the following year, 1913, the General Assembly enacted the Workmen's Compensation Law (103 Ohio L. 80). Section 22 thereof (Section 1465-69, General Code), was as follows:

> "Except as hereinafter provided, every employer mentioned in subdivision two of section thirteen hereof, shall, in the month of January, 1914, and semi-annually thereafter, pay into the state insurance fund the amount of premium determined and fixed by the state liability board of awards for the employment or occupation of such employer, the amount of which premium to be so paid by each such employer to be determined by the classifications, rules and rates made and published by the board; and such employer shall semi-annually thereafter pay such further sum of money into the state insurance fund as may be ascertained to be due from him by applying the rules of the board, and a receipt or certificate certifying that such payment has been made shall immediately be mailed to such employer by the state liability board of awards, which receipt or certificate, attested by the seal of the board, shall be prima facie evidence of the payment of such premium.
>
> "Provided, however, that as to all employers who are subscribers to the state insurance fund at the time of the taking effect of this act, or who may before January 1, 1914, elect to become subscribers thereto, the foregoing provisions for the payment of such premiums in the month of January, 1914, and semi-annually thereafter, shall not apply, but such subsequent semi-annual premiums shall be paid by such employers from time to time upon the expiration of the respective periods for which payments into the fund have been made by them. And provided further, that such employers who will abide by the rules of the state liability board of awards and as may be of sufficient financial ability or credit to render certain the payment of compensation to injured employes or to the dependents of killed employes, and the furnishing of medical, surgical, nursing and hospital attention and services and medicines, and funeral expenses equal to or greater than is provided for in this act, or such employers as maintain benefit funds or departments or jointly

with other employers maintain mutual associations of such said financial ability or credit, to which their employes are not required or permitted directly or indirectly to contribute, providing for the payment of such compensation and the furnishing of such medical, surgical, nursing and hospital services and attention and funeral expenses, may, upon a finding of such facts by the state liability board of awards elect to pay individually or from such benefit fund department or association such compensation, and furnish such medical, surgical, nursing and hospital services and attention and funeral expenses directly to such injured or the dependents of such killed employes; and the state liability board of awards may require such security or bond from said employers as it may deem proper, adequate and sufficient to compel or secure to such injured employes, or to the dependents of such employes as may be killed, the payment of the compensation and expenses herein provided for, which shall in no event be less than that paid or furnished out of the state insurance fund, in similar cases, to injured employes or to the dependents of killed employes, whose employers contribute to said fund; and said board shall make and publish rules and regulations governing the mode and manner of making application, and the nature and extent of the proof required to justify such finding of facts by the board as to permit such election by such employers, which rules and regulations shall be general in their application, one of which rules shall provide that all employers electing directly to compensate their injured and the dependents of their killed employes as hereinbefore provided, shall pay into the state insurance fund such amount or amounts as are required to be credited to the surplus in paragraph two of section seven hereof.

"The state liability board of awards may at any time change or modify its finding of facts herein provided for, if in its judgment such action is necessary or desirable to secure or assure a strict compliance with all the provisions of this act in reference to the payment of compensation and the furnishing of medical, nurse and hospital services and medicines and funeral expenses to injured and the dependents of killed employes."

Shortly following the enactment of the original Act, the plaintiff, and many other employers, elected to pay compensation directly instead of contributing to the State Fund, and thereupon entered into contracts of indemnity with various liability insurance companies to protect them against their liability, which contracts were indeterminable, except that either party might, upon thirty days' written notice, effect cancellation of the same.

Under original Section 22 (1465-69), and before the amendment thereof of 1917, three conditions precedent were essential to a favorable finding of fact by the Industrial Commission, upon which the right to pay the compensation directly depended:

1. That the applicant was "of sufficient financial ability or credit."

2. That the applicant would give the required bond.

3. That the applicant would pay into the State Fund the five per cent required from all employers to be credited to the State Fund for the maintenance of a reasonable surplus therein.

The effect of the two amendments of 1917, read in connection each with the other, as, being in **pari materia**, they should be, has been to add a fourth condition precedent, to be found as a fact by the Industrial Commission, before the right to pay the compensation direct can arise, to wit:

4. That the applicant will not carry insurance which undertakes to indemnify or insure such employer against loss or liability for the payment of compensation to injured or the dependents of killed employes.

This additional condition and requirement will not impair the obligation of the indemnity insurance contracts which were in force when the new legislation took effect, and which were based upon the requirements of original

Section 22, for the law wrote into them the proviso that their terms were subject to such changes and conditions as the State might thereafter impose with respect to the right to continue to pay the workman's compensation directly. They were entered into in the light of the knowledge, conclusive upon the parties to them, that the conditions of the privilege to pay direct, the exercise of which the insurance companies protect, might be thereafter changed, modified or altogether taken away. To assume otherwise is to assume that there was an obligation on the part of the State, amounting to a contract, that it would not change existing legislation upon the subject, either by repeal or by adding further conditions to the privilege of paying the compensation direct.

The plaintiffs in error sought in their action, to enjoin the Industrial Commission "from revoking, changing or modifying said findings of fact" (Record, p. 24), to wit, the original findings of fact, upon which their right to pay the compensation directly rested, and upon which their insurance contracts were based, and yet original Section 22 (1465-69) expressly provided that:

> "The state liability board of awards may at any time change or modify its finding of facts herein provided for, if in its judgment such action is necessary or desirable to secure or assure a strict compliance with all of the provisions of the laws in reference to the payment of compensation and the furnishing of medical, nurse, and hospital services and medicines and funeral expenses to injured and the dependents of killed employes."

Under this provision, it was within the power of the Industrial Commission to make the changes and modifications in its findings of fact sought to be enjoined, independently of the legislation of 1917, if in its judgment the same were necessary or desirable. The insurance contracts were entered into in the light of that expressly reserved power.

THE AUTHORITY TO PAY WORKMEN'S COMPENSATION DIRECTLY IS A LICENSE.

The privilege emanating from the state, to pay workmen's compensation directly is a license, pure and simple. The general requirement of the Workmen's Compensation Law is that all employers shall pay into the state fund. An exception to that general rule is made with respect to those who desire to pay the compensation directly and can and do comply with the conditions prescribed in that regard. The language of Section 22 (1465-69) is:

> "Except as hereinafter provided, every employer * * * shall * * * pay into the state insurance fund."

As Section 22 stood before the recent amendment, the privilege of an employer to pay the compensation directly arose when the Industrial Commission made a finding of fact that the applicant would abide by its rules, that he was of sufficient financial standing and credit, and he had given the required bond and continued to pay into the state fund the five per cent. required from all employers to be credited to the surplus fund.

This privilege to pay the compensation directly was in no sense a contract between the employer who received it and the state, nor did it confer any vested right which might not be modified or taken away altogether. A license is defined to be "permission granted by some constituted authority to do an act which, without such permission would be illegal." In the absence of the favorable finding of fact and compliance with the other prescribed conditions, it would have been illegal for the plaintiff to have refused to pay into the general state

fund and to have attempted to pay the compensation directly.

The contention that the granting by the state of a license for an indefinite period of time, to engage in a particular trade or profession is in the nature of a contract, and that the licensee is thereby vested with the right to continue in such trade or profession unless he is deprived thereof by due process of law, although not infrequently made, has not been recognized by the courts as sound or tenable. On the contrary, the consensus of the decided cases is to the effect that the granting of a license in such cases is merely the means taken by the state, in the exercise of the police power, to regulate and restrict the engaging in certain professions and occupations, for the public good, and confers no right whatever, in the way of a contract with the state, upon the licensee. He takes the same subject to the right of the state, at any time that the public good demands, to revoke it or add further restrictions and regulations to the privilege, and if such regulations are reasonable they will be upheld even though they may actually prohibit some people from further engaging in such occupations or professions, under a license formerly granted.

In the case of **Reetz vs. Michigan**, 188 U. S., 505, it appeared that a license had been issued to engage in the practice of medicine. Some years later another law was passed by which it was required that another license be taken out. A holder of an original license refused to take out a new license and was arrested for practicing medicine without the same. It was contended that the later statute was in the nature of an **ex post facto** law. This court refused to sustain this contention and held that there was nothing in the later statute which brought it within the inhibition of the Constitution.

The constitutionality of a law imposing a tax upon lawyers was sustained in **Simmons vs. State**, 12 Mo., 268,

wherein in considering the status of one admitted and licensed to practice law, it was said:

> "None of the essential elements of a contract are to be found in the grant of a license to practice law; there is no engagement between the state and the applicant for a license that he will follow the practice of the law for a livelihood; no legal consideration is paid the state for the license. The grant of the license is a mere naked grant of a privilege without consideration, and which the applicant may or may not, at his option, avail himself of. Therefore, the state may revoke the privilege granted, or, may impose such conditions upon its exercise as are deemed proper or demanded by the public interest."

There was no promise, express or implied, upon the part of the state that the conditions upon which the authority or license to the plaintiff to pay the workmen's compensation directly went forth should remain perpetually without change or modification. There was no compact that the privilege might not in the future be entirely withdrawn, and thereby the intention and real purpose of the people in adopting Section 35 of Article II of the Constitution in 1912, authorizing compulsory contributions by employers to the state fund, be fully carried out.

The insurance contract which the plaintiff claims to be protected against impairment or violation by the Constitution, was based and rested upon his privilege or license to pay the compensation directly. If the state should see fit to withdraw the license outright, a contingency not at all remote, by the repeal of that portion of Section 22 which authorizes it, the insurance policies of the plaintiff could only be held to still continue to exist upon the theory that the license itself was a contract, impregnable against change, and that the state, having once permitted an applicant to pay directly, had bartered away its power to deal with the subject, and

was forever thereafter, so far as the particular individual was concerned, precluded and debarred from making any change or modification whatever in the statutory regulations relating to direct payment of compensation by employers.

THE POLICE POWER OF THE STATE CANNOT BE BARTERED AWAY.

There is no vested right in existing police regulations which precludes a change therein, or which exempt a contract from subsequent legislation on the subject matter.

It was held by this court in the case of **Louisville and Nashville R. Co. vs. Mottley**, 219 U. S., 467 (decided in 1911):

> "The power of Congress to act in regard to matters delegated to it is not hampered by contracts made in regard to such matters by individuals; but contracts of that nature are made subject to the possibility that even if valid when made Congress may by exercising its power render them invalid.
>
> "An act of Congress rendering contracts in regard to interstate commerce invalid does not infringe the constitutional liberty of the citizen to make contracts; and an act, otherwise constitutional, is not unconstitutional under the Fifth Amendment, as taking private property without compensation, because it invalidates contracts between individuals which conflict with the public policy declared in the act.
>
> "After the enactment of the act of June 29, 1906, it was unlawful for a carrier to issue interstate transportation in pursuance of a prior existing contract to do so as compensation for injuries received, and even though valid when made, such a contract cannot now be enforced against the carrier by suit."

The facts of the case were these: As the result of a collision in Kentucky of trains belonging to the Louisville and Nashville Railroad Company, Mottley and wife received serious personal injuries. The collision, it was alleged, was caused by the gross negligence of the agents

and servants of the company. The Mottleys and the company thereafter entered into a written agreement whereby, in consideration of the release by the former of all damages and claims for damages by reason of the collision, the company agreed to issue free passes for transportation on its road for the remainder of the current year and thereafter to renew said passes during the lives of Mottley and wife, or either of them. The company adhered to the agreement for many years, but after the passage of the act regulating commerce, of June 29, 1906, refused further to do so, upon the ground that the act rendered the contract illegal. The act provided:

> "Sec. 1. * * * No common carrier subject to the provisions of this act, after January 1, 1907, shall directly or indirectly issue or give any interstate free ticket, free pass or free transportation for passengers."

Action was brought by the Mottleys in the courts of the State of Kentucky to specifically enforce the contract, which courts granted the relief prayed for. 135 Ky., 652.

Mr. Justice Harlan, delivering the opinion, p. 482, said:

> "The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforcible or to impair its value. That the exercise of such power may be hampered or restricted by contract previously made between individuals or corporations is inconceivable. The framers of the constitution never intended any such things to exist. * * *."

Again on page 485:

> "We forbear any further citation of authorities. They are numerous and all one way. They support the view that, as the contract in question would have

been illegal if made after the commerce act, it cannot now be enforced against the railroad company even though valid when made. If that principle be not sound, the result would be that individuals and corporations could, by contract between themselves, in anticipation of legislation, render of no avail the exercise by Congress, to the full extent authorized by the Constitution of its power to regulate commerce. No power of Congress can be thus restricted."

So here, the insurance contracts in question must necessarily be regarded as having been made subject to the possibility that, at some future time, the General Assembly might so exert its power as to add further conditions to the privilege of employers to pay the workmen's compensation directly or might withdraw it altogether. Conceding the insurance contracts to have been valid when made, they are now inimical to the declared policy of the state and in conflict with the very letter of the statute.

It was said by the Supreme Court of Vermont in the case of **Fitzgerald vs. Grand Trunk Ry. Co.**, 63 Vermont, 169:

"There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal, nor vested right in the omission to legislate upon a particular subject which exempts a contract from the effect of subsequent legislation upon the subject matter by competent legislative authority.

"Neither party can insist upon enforcing the obligation of a contract in defiance of a subsequent statute enacted to protect the public health, safety or morals."

15 Am. & Eng. Enc. Law, 1042.

In the case of **Boyd vs. Alabama**, 94 U. S., 645, it appeared that Boyd was convicted of carrying on a lottery contrary to law. In his defense, he relied upon a statute which authorized lotteries, under which he had

received a license. The repeal of this statute, which made his license of no avail against the general law forbidding lotteries, was asserted by his counsel to be void as impairing the obligation of the contract, of which his license was evidence, the Supreme Court of Alabama having previously held such license to be a contract.

This Court followed the decision of the state court holding the law under which the license was issued to be void because its object was not expressed in its title, but, in the opinion, Mr. Justice Field observed:

> "We are not prepared to admit that it is competent for one legislature, by any contract with an individual, to restrain the power of a subsequent legislature to legislate for the public welfare, and to that end to suppress any and all practices tending to corrupt the public morals."

In the case of **Beer Company vs. Massachusetts**, 97 U. S., 25, it appears that the Boston Beer Company had been chartered by an act of the legislature of Massachusetts in 1828, with the right to manufacture and sell beer.

Subsequent statutes of a prohibitory character seemed to interfere with that right and the case was brought to the Supreme Court of the United States on the ground that they impaired the obligation of the contract of charter. But the Court held that on this subject the legislature could make no irrepealable contract. Mr. Justice Bradley, delivering the opinion, page 33, said:

> "Whatever difference of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maximum **salus populi suprema lex**; and they are to be attained and provided for by such ap-

propriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

The case of **Stone** vs. **Mississippi**, 101 U. S. 814, was the case of a chartered lottery whose charter was repealed by the constitution subsequently adopted. It came to this Court relying on the clause of the federal Constitution against impairing the obligation of contracts. The court held that the charter was in legal effect nothing more than a license to enjoy the privilege for the time, and on the terms specified, subject to future legislative or constitutional control. Chief Justice Waite delivering the opinion, page 819, said:

> "The question is therefore directly presented whether, in view of these facts, the legislature of a state can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No legislature can bargain away the public health or the public morals. The people themselves cannot do it, must less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself."

It was held by this court in the case of **Butchers Union Co.** vs. **Crescent City Co.**, 111 U. S. 746:

> "The power of a state legislature to make a contract of such a character that, under the provisions of the constitution, it cannot be modified or abrogated, does not extend to subjects affecting public health or public morals, so as to limit the future exercise of legislative power on those subjects to the prejudice of the general welfare."

It was observed by Chief Justice Lord Ellenborough, in the case of **Atkinson** vs. **Richie**, 10 East, 530:

> "That no contract can properly be carried into effect, which was originally made contrary to the provisions of law, or which being made consistently with the rules of law at the time, has become illegal in virtue of some subsequent law, are propositions which admit of no doubt."

Referring to the police power, it was said by Chief Justice Ruger, in the case of **People** vs. **Squire**, 107 N. Y. 606:

> "The right to exercise this power cannot be alienated or abridged by any grant, contract or delegation whatsoever, because it constitutes the exercise of a governmental function without which it would become powerless to protect those rights which it was specially designed to accomplish."

This Court, in the case of **Douglas vs. Kentucky**, 168 U. S. 488, declared in its syllabus:

> "By the constitution of Kentucky of 1891 it was provided that 'lotteries and gift enterprises are forbidden, and no privileges shall be granted for such purposes, and none shall be exercised, and no schemes for similar purposes shall be allowed. The general assembly shall enforce this act by proper penalties. All lottery privilege or charters heretofore granted are revoked." Held:
>
> "1. That the provision when applied to a previous existing lottery grant in the State of Kentucky was not inconsistent with the contract clause of the Constitution of the United States;
>
> "2. That a lottery grant is not, in any sense, a contract within the meaning of the constitution, but is simply a gratuity and license, which the state, under its police powers, and for the protection of the public morals, may at any time revoke, and forbid the further conduct of the lottery."

It was held in the case of **Chicago, etc., Railroad** vs. **Nebraska**, 170 U. S. 58:

> "The contract between the City of Omaha, the Union Pacific Railway Company, and the Omaha &

Southwestern Railroad Company, of February 1, 1886 (founded upon the act of Nebraska of March 4, 1885, relating to viaducts, bridges and tunnels in cities) providing for the building of a viaduct along Eleventh street in Omaha, at the expense of the two railroad companies, was a contract in such a sense that the respective parties thereto continued to be bound by its provisions so long as the legislation, in virtue of which it was entered into, remained unchanged; but it was not a contract whose continuance and operation could not be affected and controlled by subsequent legislation.

"When the subject matter of such a contract is one which affects the safety and welfare of the public, the contract is within the supervising power and control of the legislature, when exercised to protect the public safety, health and morals, and the clause of the Federal Constitution, which protects contracts from legislative action cannot, in every case, be successfully invoked."

In the case of **Northern Pacific Railway Company** vs. **Duluth**, 208 U. S. 583, it was held:

"The right to exercise the police power is a continuing one that cannot be limited or contracted away by the state or its municipality, nor can it be destroyed by compromise as it is immaterial upon what consideration the attempted contract is based.

"The exercise of the police power in the interest of the public health and safety is to be maintained unhampered by contracts in private interests, and uncompensated obedience to an ordinance passed in its exercise is not violative of private rights protected by the Federal Constitution."

The insurance contracts in question were based and depended upon the privilege of the insured to pay the workmen's compensation directly. The right of the state, from time to time, to change the conditions upon which the privilege might be exercised, or to take it away altogether, cannot be questioned. To maintain that such contracts, entered into under provisions of the statute which rendered them valid when made, are impregnable

as against subsequent legislation with which they are inconsistent, is to assume that the state may be fettered in the exercise of its police power and under Section 35 of Article II of its Constitution, by contracts between citizens. If 675 contracts, the number here involved, affecting 150,000 workmen, are so impregnable, a slightly greater effort by the liability companies while the legislation in question was impending, might readily have covered the entire field. In that view, the state would have found itself bound hand and foot and could not, during and beyond the present generation of men, for these contracts are claimed to be perpetual, exercise its police power upon a subject-matter which vitally affects the welfare of a large proportion of the people of the state. Such a view of the law is inadmissible in reason, and under the cases to which we have referred, to which a great many more might be added. None can be found to support it.

THE LEGISLATIVE ACTS IN QUESTION APPLY TO EXISTING CONTRACTS.

It is contended that the legislative acts under consideration do not and were not intended to apply to insurance contracts indemnifying against loss or liability for the payment of workmen's compensation in existence at the time they took effect; that they are prospective merely, having reference only to the future.

There is no question here of prospective or retroactive operation. The laws under consideration inhibit such insurance. To do so or to continue to do so is unlawful.

No one disputes the general proposition that ordinarily statutes will be construed to operate prospectively; that criminal statutes do not apply to acts committed before their passage; that they cannot be made to affect property rights which have become vested. A thousand cases

might be cited in support of it. But they have no application here.

Whenever a legislative power is called into exercise which has to do with the public welfare, then it can be made to so operate upon existing conditions as to prevent the further continuance of evils and mischiefs against which it is directed.

This principle is illustrated in almost every one of the cases hereinbefore cited, and typically, in the case of **United States** vs. **Missouri Freight Association**, 166 U. S. 290, where this Court held that the Interstate Commerce Law, of 1890, applied to and prevented the further continuance of a traffic agreement between certain Western Railroad Companies, of long standing and great importance. The Court held:

> "The provisions respecting contracts, combinations and conspiracies in restraint of trade or commerce among the several states or with foreign countries, contained in the act of July 2, 1890, c. 647, 'to protect trade and commerce against unlawful restraints and monopolies,' apply to and cover common carriers by railroad; and a contract between them in restraint of such trade or commerce is prohibited, even though the contract is entered into between competing railroads, only for the purpose of thereby affecting traffic rates for the transportation of persons and property.
>
> "This agreement, though legal when made, became illegal on the passage of the act of July 2, 1890, and acts done under it after that statute became operative were done in violation of it."

So here, the insurance contracts under consideration, though legal when made, became illegal when the two acts became operative.

All of the cases cited under the preceding subject involved the question of prospective operation. The legislation under discussion in each of those cases was held to apply to existing conditions and contracts, and to so op-

erate as to prevent a continuation of the things against which the legislation was directed.

The rule that ordinarily statutes will be construed to operate prospectively is not one of universal application. It depends entirely on the legislative intent, and that intent is to be gathered not merely from the context but from the facts and circumstances which led to their adoption, as well. Upon such an inquiry, the court will look into the grievances, the evils, the mischiefs intended to be remedied.

* * *

The two legislative acts in question were passed in furtherance of the obvious intent of Section 35 of Article II of the Ohio Constitution that the state fund therein contemplated should constitute the only insurance to which injured employes and the dependents of those killed in the course of employment, might look for compensation, and that the workmen of the state should not be divided into two classes, one of which is protected by the fund administered by the state and the other compelled to look to private corporations for compensation.

However much may be said in the effort to bolster up the morality of contracts of insurance which indemnify employers of labor against the consequences of their personal negligence, the legislation here under consideration indicates that the strong and preponderant sentiment of the people of Ohio is against it.

The Ohio General Assembly in enacting it, has not undertaken to prohibit indemnity insurance of all kinds, but only a very small branch of a very large business, viz., that of employers against loss or liability for the payment of workmen's compensation. The constitutional guaranties of equality do not prohibit legislation which is limited to the objects to which it is directed. They do not prescribe rigid equality, but leave a wide latitude to the wisdom and discretion of the law making power.

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